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No. 75-1165

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

American Trucking Associations, Inc., appeals from the judgment of the United States District Court for the District of Columbia, denying its complaint to set aside an order of the Interstate Commerce Commission, and submits this statement to show that this Court has jurisdiction over the appeal and that substantial questions warranting plenary review are presented.

OPINION BELOW

The opinion of the court below, entered October 20, 1975, but not yet reported at the time of the printing

of this statement, and the order are attached hereto as Appendix A. A copy of the decision and order of the Interstate Commerce Commission, division 3, in Docket No. MC-F-10314, *Smithsons Holding Ltd.—Control—Smith Transport (U.S.), Ltd.*, and Docket No. MC-F-11173, *Smithsons Holdings, Ltd., and Canadian Pacific Railway Company—Investigation of Control—Smith Transport (U.S.), Ltd.*, served October 15, 1974, is attached as Appendix B. A copy of the initial decision of the administrative law judge, served September 17, 1973, is attached as Appendix C.[1]

JURISDICTION

This action was brought pursuant to the provisions of 28 U.S.C. §§ 1336, 2284, and 2321-2325 to enjoin, set aside and annul an order of the Interstate Commerce Commission, served Ocotber 15, 1974.[2] A hearing was held before a three-judge district court, and the court entered its order denying appellant all relief sought on October 20, 1975. A notice of appeal was filed in the district court on December 18, 1975, and a copy is attached as Appendix D. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the final judgment of the district court on direct appeal. *American Commercial Lines* v. *Louisville & N.R.R.*, 329

[1] Since the Commission issued only a brief decision and order adopting the administrative law judge's initial decision, it is necessary to print his report in order to present this Court with the rationale of the Commission's action herein.

[2] By Public Law No. 93-584, enacted January 2, 1975, judicial review of decisions of the Interstate Commerce Commission has been changed, and the pertinent sections of title 28 of the United States Code have been amended or repealed to provide for appeal of ICC decisions to the U.S. Courts of Appeal and thereafter review by this Court on writ of certiorari. These changes do not affect this proceeding since it was commenced prior to the applicability of Pub. L. No. 93-584. See section 10 thereof, 88 Stat. 1917 (1975).

U.S. 571 (1968) and *United States* v. *Drum*, 368 U.S. 370 (1962).

THE STATUTES INVOLVED

The pertinent statutory provisions are the National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, and section 5(2), (4) and (7) of the Interstate Commerce Act, 49 U.S.C. §§ 5(2), (4) and (7). A copy of these provisions is attached as Appendix E.

QUESTIONS PRESENTED

1. Whether, as a matter of law, the Interstate Commerce Commission may approve an acquisition and control of a motor carrier by a railroad to perform operations which are not functionally tied in to the rail operations.

2. Whether, in fact, the proposed transaction meets the statutory standard of section 5(2)(b) of the Interstate Commerce Act and will assist the rail parent in the performance of its operations.

STATEMENT OF THE CASE

Smithsons Holdings Ltd. (Smithsons) filed a section 5 application[3] (Docket No. MC-F-10314) seeking acquisition and control of Smith Transport (U.S.) Ltd. on November 25, 1968. Both companies are Canadian corporations, as is Smithsons' parent, Canadian Pacific Ltd. The parent company, directly and through sub-

[3] Section 5 of the Interstate Commerce Act (49 U.S.C. § 5) governs purchase, merger or consolidation of carriers. Section 5(2)(b) thereof contains a proviso that the Commission shall not approve and authorize a transaction involving a railroad and motor carrier, as here, "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

sidiaries, engages in Canada in the businesses of transportation by railroad, steamship, airline, and motor carrier, hotel operations, mining, and telecommunications, among others. Through its ownership of a controlling interest in the capital stock of the Soo Line Railroad and its operation of a small amount of trackage in Maine and Vermont, Canadian Pacific is a "carrier by rail" within the meaning of the Interstate Commerce Act.

Smith is a motor common carrier certificated by the Interstate Commerce Commission to transport either general or specified commodities throughout New York and into Vermont, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, Pennsylvania and Ohio, restricted generally to traffic moving to or from Canada in foreign commerce via several New York ports of entry.

For several years Smithsons did not prosecute its section 5 application, but sought dismissal thereof on the ground that the transaction did not fall within the ambit of section 5, because legal ownership, control and actual management responsibility of Smith was vested in an unaffiliated non-carrier pursuant to a trust agreement. A hearing was held in December, 1969, on this jurisdictional question in which American Trucking Associations, Inc. (ATA), and four independent motor carriers participated as protestants. In March, 1970, a hearing examiner recommended denial of the motion to dismiss, finding that control of Smith by Smithsons, and in turn, by Canadian Pacific, was effectuated in violation of section 5(4) of the Interstate Commerce Act. He stated that the affairs of Smith and a Canadian motor carrier owned by Canadian Pacific[4] "are so in-

[4] Also named Smith Transport. The report generally distinguishes between the two companies as Smith (U.S.) and Smith (Canada). At the time the U.S. authority was originally obtained in 1941 until 1958, there was one family-held company. Thereafter, the Canadian Pacific obtained control of Smith (Canada) and a separate company, Smith (U.S.), was created to preclude a section 5 application similar to the present one.

tertwined by a common ancestry that an escape from management in a common interest cannot be effectively achieved."

While exceptions to the examiner's report were pending,[5] Smithsons filed in February, 1971, a petition to reopen the proceeding for further hearing. Smithsons sought to amend its application and submit evidence to permit the Commission "not only to decide the question of law regarding its jurisdiction over the transaction as a whole, but to give the Commission an opportunity to pass on the question, whether in the facts of the proceeding, 'special circumstances' exist which justify control of Smith (U.S.) by Smithsons Holdings." By decision and order of division 3 of the Interstate Commerce Commission, served June 18, 1971, the recommendations of the hearing examiner were adopted, an investigation proceeding under section 5(7) of the Interstate Commerce Act was instituted (Docket No. MC-F-11173), and applicant's petition to supplement its section 5 application was granted.

On January 10, 1972, a hearing was held concurrently on the section 5 application and the investigation proceeding. ATA and the four protestant motor carriers filed a brief with the administrative law judge (ALJ).[6] His initial decision was served on September

[5] All parties filed exceptions. Protestants objected to the examiner's findings that their earlier filed petition for divestiture was premature, and if warranted, may only be ordered after investigation pursuant to section 5(7) of the Interstate Commerce Act.

[6] In the interim between the two hearings, the "hearing examiner" designation was changed to "administrative law judge" and the "recommended report and order" became an "initial decision."

17, 1973. (App. C) Although he found section 5(4) violations, he held that the investigation should be dismissed. He further found that the acquisition and control comply with section 5(2)(b) and should be approved. To support this finding, the ALJ maintained, at sheet 25:

> Although Canadian Pacific must by law continue to provide LCL service in its Canadian operation and we have no jurisdiction over this portion of its operation, it cannot be overlooked that the motor carrier service in the United States is part of substituted motor-for-rail operations in the movement of small shipments between the two countries and therefore to public advantage in rail service. . . .

Exceptions to the initial report were filed only by ATA. The independent motor carrier protestants, because of cost and delay, have fallen by the wayside, which, of course, does not detract from the importance of the principle here involved. The Interstate Commerce Commission, division 3, served the decision and order here appealed from, on October 7, 1974. (App. B) The decision corrected the ALJ's inaccurate reference to the operations to be purchased as "substituted motor-for-rail operations," [7] and in all other respects adopted the ALJ's decision. Thereafter, ATA unsuccessfully filed a petition requesting the Interstate Commerce Commission to find that the proceeding involves an issue of general transportation importance and allow further petitions for reconsideration. The proceeding was thereby rendered administratively final.

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[7] "Substituted motor-for-rail operations" is a term of transportation art referring to the actual replacement by a more efficient motor carrier service of an existing rail service, and is properly sought in a section 207 application for authority to conduct new motor operations (49 U.S.C. § 307), not through a section 5 purchase of existing authority and operations. This error represents more than a mere misuse of terms; it is an acknowledgement that there can be no functional tie in to the railroad's operations.

Having exhausted its administrative remedies, ATA filed on February 27, 1975, an action in the United States District Court for the District of Columbia to permanently suspend, enjoin, annul and set aside the aforesaid report and order of the Interstate Commerce Commission. The district court denied all relief, holding that the evidence "clearly supports the Commission's finding that Canadian Pacific will be able to use the services of Smith Transport (U.S.) to public advantage in its operations." (App. A, p. 10a) The opinion and order of the district court were entered on October 20, 1975, and a notice of appeal was filed and served by appellant herein on December 18, 1975. (App. D)

THE QUESTIONS ARE SUBSTANTIAL

This is a case of first impression before this Court. It involves the question whether the Interstate Commerce Commission may approve an acquisition of a motor carrier by a railroad to perform operations which are not functionally tied in to the rail operations. There have been cases before this Court in the past involving the question of the Commission's power to grant railroads totally unrestricted motor carrier authority in an application proceeding where shipper witnesses have testified to the special needs for the motor operations of the railroad, and this Court has interpreted the less stringent provisions of section 207 of the Interstate Commerce Act governing that type of application as permitting the Commission to authorize a railroad to perform unrestricted motor operations upon a finding of "special circumstances." See, e.g., *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957).

There has not been a case before this Court or even in the lower courts involving the Commission's power to grant railroads totally unrestricted motor carrier authority in a purchase proceeding with one exception.

In *American Trucking Association* v. *Frisco Co.*, 358 U.S. 133 (1958), this Court affirmed the Commission's power to correct an inadvertent ministerial error which caused the issuance of unrestricted motor-carrier authority to the railroad subsidiary. The evidence there established that only operations auxiliary and supplemental to train service were required, and the Commission had inadvertently left that restriction out of the certificate it issued. ATA argued there that—aside from the question of inadvertent error—the Commission was, in any event, without power to issue unconditioned certificates under the section 5(2)(b) requirements. This Court permitted correction of the certificate and did not find it necessary to decide ATA's argument, saying:

> We have not had occasion to rule definitively whether that Section states rigid requirements that operations of rail-affiliated motor carriers be auxiliary and supplemental to train service. Cf. American Trucking Assns. v. United States, 355 U.S. 141. As resolution of the question is unnecessary for the present decision, we intimate no position with regard to it. [358 U.S. at 141 n. 5]

The instant proceeding under review offers the Court a much needed opportunity to render a definitive decision on this question.

1. The Commission's Implementation of Congress' Policy Against Rail Incursions Into The Motor Carrier Field.

This Court is well aware of the strong anti-monopoly policy adopted by Congress with regard to railroad control of interstate carriage by motor vehicle. By the Motor Carrier Act, 1935, which created Part II of the Interstate Commerce Act, the Commission was authorized to approve the acquisition or control of a motor carrier by another such carrier upon a finding, after hearing, that the "transaction proposed will be consistent with

the public interest." However, should the applicant for Commission approval be a "carrier other than a motor carrier," the Commission was precluded from acting favorably upon the proposal unless the proposed transaction met the following three requirements:

(1) It would "promote the public interest;"

(2) It would enable the acquiring carrier "to use service by motor vehicle to public advantage in its operations;" and

(3) It would "not unduly restrain competition."[3]

The purpose of these added findings, prerequisite to Commission approval of rail acquisitions of motor carriers, as explained by Chairman Sadowski of the Subcommittee of the House Committee on Interstate and Foreign Commerce, was to assure that "control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation." 79 Cong. Rec. 12206, July 31, 1935. In short, as stated by Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, it was expected that "with this limitation, it will be possible for the Commission to allow acquisitions which will make for coordinated or more economical service and at the same time to protect against the monopolization of highway carriage by rail, express, or other interests." 79 Cong. Rec. 5655, April 15, 1935.

Congress' expression of a strong policy against railroad entry into the motor carrier field is further evidenced by the directive in the National Transportation Policy that the Interstate Commerce Act be so adminis-

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[3] Formerly section 213 of the 1935 Motor Carrier Act, and now section 5(2)(b), 49 U.S.C. § 5(2)(b) due to the Transportation Act of 1940. That Act also changed the phrase "a carrier other than a motor carrier" to "a carrier by railroad."

tered as to recognize and preserve the "inherent advantages" of all modes of transportation. (49 U.S.C. preceding §§ 1, 301, 901, and 1001)

The decision in *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936) reveals the Commission's early efforts to implement this Congressional policy. The case involved an application by a rail subsidiary motor carrier to purchase the operating rights of an independent motor carrier in order to provide a dual service, on the one hand fully coordinated with, and on the other, completely divorced from, the service of the rail parent. The Commission, division 5, observed, 1 M.C.C. at 109, that "[i]t is the obvious intent of the Act that special safeguards shall surround acquisitions of motor carriers by carriers engaged in other forms of transportation, and no doubt railroads were particularly in mind." It went on to say (1 M.C.C. at 111-112):

> we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

And, at page 113, the Commission held that rail operation of motor vehicles must be "confined to service auxiliary and supplemental to that performed by the . . . [railroad] in its rail operations and in territory parallel and adjacent to its rail lines." In a report and order supplementing its original *Barker* decision, the Commission noted, 5 M.C.C. 9, 11, that ". . . it will be of advantage to the parties in this and later proceedings if we here amplify the meaning of those conditions." It then did so, saying (Id. at 11-12):

> Approved operations are those which are auxiliary or supplementary to train service. Except as hereinafter indicated, nonapproved operations are those which otherwise compete with the railroad itself, those which compete with an established motor carrier, or which invade to a substantial degree a territory already adequately served by another rail carrier.

The great bulk of the cases dealing with the issuance of certificates to railroad motor subsidiaries from the *Barker* decision on makes specific reference to the auxiliary and supplemental standard.

This Court, in two separate decisions, first recognized and endorsed the standard both for acquisitions under section 5 and for applications for new authority under section 207 of the Act and then qualified the standard as "mandatory" in section 5 proceedings and permissive in section 207 application proceedings.

In *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 430-31 (1951), this Court recognized and endorsed the Commission's policy to impose auxiliary and supplemental restrictions:

> We think that at the time of issuance of the certificate, if the Commission reasonably deems the restriction useful in protecting competition, or for other

statutory purposes, the Commission may require the railroad-affiliated motor carrier to perform only those services that are auxiliary and supplemental to the rail service. That the railroads made use of motor carriage primarily in such fashion was known to the Congress before the enactment of any regulatory legislation in the field. Such a restriction is a logical method to insure the maximum development of the two transportation agencies—rails and motors—as coordinate transportation services in accordance with the Declaration of Policy, § 202(a) of the Motor Carrier Act of 1935, 49 Stat. 543, later incorporated into the National Transportation Policy, prefixed to the Interstate Commerce Act of 1940, 54 Stat. 899. Specific statutory authority is found in the requirements of the proviso in § 213(a) of the Motor Carrier Act of 1935 and § 5 of the Interstate Commerce Act as amended in 1940, quoted in note 3, *supra*. Railroad operations as motor carriers are forbidden by that acquisition section except to enable a railroad "to use service by motor vehicle to public advantage in its operations." (Footnotes omitted)

The Commission's authority to impose five specific auxiliary and supplemental restrictions[9] in two separate op-

[9] These restrictions with slight variations, found in all certificates authorizing coordinated rail-motor operations, are as follows:

a. The service to be performed by the motor carrier shall be limited to service which is auxiliary to, or supplemental of, rail service of the railroad.

b. The motor carrier shall not serve, or interchange traffic at any point not a station on the rail line.

c. Shipments transported by the motor carrier shall be limited to those which it receives from or delivers to the railroad under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail.

[Footnote continued on page 13]

erating authorities purchased by the rail-affiliated motor carrier was then upheld by this Court.

Six years later, in *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957), this Court had occasion to review a grant of motor carrier authority to the same rail affiliate at substantially the same points over the same routes. This time the Commission granted a section 207 application[10] to conduct unrestricted operations which were not functionally tied to train service. This Court, in affirming the Commission's decision, explained (355 U.S. at 149-150):

> In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplemental restrictions in many § 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where "special circumstances" prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in

[9] (Continued)

d. All contractual arrangements between the motor carriers and the railroad shall be subject to revision, if and as we find it to be necessary in order that such arrangements shall be fair and equitable to the parties.

e. Such further specific conditions as we, in the future, may find it necessary to impose in order to restrict the motor carrier's operation to service which is auxiliary to, or supplemental of the rail service of the railroad.

[10] Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * * * [49 U.S.C. § 307(a)].

the public interest. At least three of these cases had been decided when the Congress extensively revised the Interstate Commerce Act by enactment of the Transportation Act of 1940, 54 Stat. 898, in which § 213 of the Motor Carrier Act was substantially re-enacted into § 5(2)(b) of the Interstate Commerce Act, while § 207(a) was left unchanged.

We conclude, therefore, that the Congress did not intend the *rigid requirements of § 5(2)(b)* to be considered as a limitation on certificates issued under § 207. (Footnotes omitted, emphasis supplied)

This Court went on to explain that its decision was not contrary to its holding in *United States* v. *Rock Island Motor Transit Co., supra*, and emphasized (355 U.S. at 151-152):

We repeat . . . that the underlying policy of § 5 (2)(b) must not be divorced from proceedings for new certificates under § 207. Indeed, the Commission must take "cognizance" of the National Transportation Policy and apply the Act "as a whole." But, for reasons we have stated, we do not believe that the Commission acts beyond its statutory authority when in the public interest it occasionally departs from the auxiliary and supplemental limitations in a § 207 proceeding.

This Court stated a year later in the *Frisco* decision, *supra*, that it intimates no position on the question now before the Court. Nevertheless, we submit that the above-cited portions of the Court's second *Rock Island* decision are an intimation that the provisions of section 5(2)(b) are to be considered more restrictive than those found in section 207.

2. The Opinion Of The Lower Court.

The lower court in its opinion first sets forth the statement of the case and fairly categorizes the issues

before it. The court then sets forth the Commission's implementation of the legislative policy underlying section 5(2)(b), describing it as "changing." The court sees the Commission as following a policy of imposing auxiliary and supplemental restrictions on rail-affiliated motor carrier certificates until 1954 when the "special circumstances" exception for section 207 applications was created. (App. A., p. 5a)

The lower court concludes that since 1954 the Commission has "frequently" issued certificates to rail affiliates in section 207 applications without restrictions where "special circumstances" exist and finds that the propriety of this policy has been approved by this Court. The lower court also correctly notes that judicial scrutiny has not been given where the Commission has applied the "special circumstances" exception in a section 5 acquisition proceeding. However, the court finds that such application of the exception by the Commission to section 5 acquisition proceedings "is entitled to great weight and should not be overruled unless clearly wrong." The court cited the same two Commission decisions which were cited by the ALJ for Commission precedent in granting unrestricted authority in section 5 proceedings, i.e., *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363 (1960) and *Canadian National Transportation, Ltd. —Investigation of Control*, 109 M.C.C. 392 (1970). (App. A, p. 7a)

Having thus determined it is properly within the discretion of the Commission to approve acquisitions of motor carriers by railroads where "special circumstances" exist, the lower court then rejects the necessity to find the same "special circumstances" required to be found in section 207 application proceedings; i.e., that a grant of the authority will not result in an undue restraint of competition and that the public convenience and necessity require such operation which the authorized inde-

pendent motor carriers have not furnished except where it suited their convenience. Instead the court states that what constitutes "special circumstances" is dependent upon the facts of each case, and the test is not entirely one of public need for the proposed service or the adequacy of existing service. (App. A, p. 9a)

Finally, the lower court holds that there is substantial evidence to support the Commission's finding that "special circumstances" exist here because of "the continuing responsibility of Canadian Pacific to transport LCL traffic and the absence of rail outlets for such traffic in the area served by Smith Transport (U.S.), coupled with the finding that approval of the transaction would be to the public advantage and in no way unduly restrain competition." (*Ibid.*) The lower court claims that appellant below contested only the second of the three findings required by section 5(2)(b) and that, insofar as the contested finding is concerned, the evidence supports the Commission's finding that the Canadian Pacific will be able to use the services of Smith Transport (U.S.) to public advantage in its operations (App. A, p. 10a)

3. The Lower Court Erred In Finding The Purchase Consistent With Statutory Provisions.

In light of the Congressional policy underlying section 5(2)(b) and of this Court's scrutiny of prior Commission decisions implementing that policy, as set forth *supra*, we submit that the lower court's approval of the instant purchase without the usual auxiliary and supplemental restrictions is contrary to that policy.[11] The Commission's few prior departures in section 5 proceedings from the imposition of auxiliary and supplemental restrictions should not be given "great weight"

[11] Of course, the factual situation does not lend itself to impositions of auxiliary and supplemental restrictions, and approval of the purchase must therefore be withheld.

since they were *per se* unlawful departures from the statutory provisions of section 5(2)(b). As noted by the lower court, none of these departures has been tested by judicial review. In reviewing the Federal Power Commission's erroneous assessment of its authority based on its reading of legislative history and its interpretation of certain Supreme Court decisions, this Court declared, "consistent error is still error." *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, 678 n. 5 (1954).

Even assuming specific auxiliary and supplemental restrictions are not required to be imposed, nevertheless, the necessary statutory findings were not properly made. The lower court erroneously found that the operations sought to be purchased here will assist the railroad in the performance of its operations. This is fatal and reversible error. The lower court misinterpreted the thrust of our argument on this point. If it is found that the motor carrier operations to be purchased by a railroad will not be utilized "to public advantage in its operations," as required by section 5(2)(b), then the legislative history makes it clear that the public interest will not be promoted, and the common ownership would unduly restrain competition, the other two considerations required by section 5(2)(b).

The finding that the railroad's operations will be assisted by the acquisition of Smith in the decision under review is based upon the following brief discussion and conclusion of the administrative law judge (App. C, p. 50a):

> Although Canadian Pacific must by law continue to provide LCL service in its Canadian operation and we have no jurisdiction over this portion of its operation, it cannot be overlooked that the motor carrier service in the United States is part of substituted motor-for-rail operations in the movement

> of small shipments between the two countries and therefore to public advantage in rail service, to say nothing of the increased advantage to the shipping public in efficiencies of movement of shipments, tracing of shipments, speed of delivery, etc. It is therefore clearly in the public interest to approve the application without restrictions.

As noted in the statement of this case, *supra*, division 3 of the Commission corrected the ALJ's erroneous reference to the motor carrier operations sought to be controlled herein as "substituted motor-for-rail operations." The division explained that substituted motor-for-rail operations is a term of art which denotes "a motor carrier service actually being substituted for rail service in direct conjunction with other rail service and in which the traffic to be handled by truck has previously moved by rail." (App. B, p. 13a). The decision and order of division 3 went on to conclude:

> that in the instant proceeding, the authority sought to be controlled is not a substitution for existing rail traffic but is authority which has been in existence for a number of years and with which Canadian Pacific became affiliated in the early 1950's in order to handle traffic that had previous to that time moved by rail but for which rail service no longer [is] available; and that the above-described error in reference does not materially affect the findings and conclusions necessary for approval of the application, as determined by the Administrative Law Judge.

This finding stretches the circumstances to fit the statutory requirement beyond the simple reality and utilizes a Lewis Carroll type of logic. The decision supports the ridiculous proposition that a railroad may obtain motor carrier authority and meet the statutory requirements of section 5 of the Act since virtually all

small shipments moved in rail service prior to the development of motor carriage. This decision should not be permitted to stand. For all intents and purposes, it simply repeals the Congressional policy expressed in section 5(2)(b).

The two cases relied upon as precedent for the Commission finding here are themselves significant departures from the required statutory finding, although neither is as blatant a departure as here. In the *Burlington* case, cited *supra*, the Commission was able to conclude (85 M.C.C. at 367) that "[t]he record contains abundant unrefuted evidence establishing that this transaction will enable the railroad to use service by motor vehicle to public advantage in its operations within the meaning of the statute, to the extent the regular-route operating rights authorize service at points which are stations on the railroad." As discussed immediately above, there can be no such finding in the instant case.

Nor can the evidence in the instant situation be said to be similar to that in the *Canadian National* case, cited *supra*, and relied upon by the ALJ as "a recent decision analagous to the proceeding here." (App. C, p. 49a) The analogy properly may be based on a long history of affiliation of two Canadian motor carriers, one operating in Canada and one in the United States, and on the Commission's tendency to overlook past illegal control and not to consider such violations of the Interstate Commerce Act as a bar to approval of a later-filed application for outright acquisition. The analogy, however, has no merit when the types of authority sought to be acquired in the two proceedings are compared. In the *Canadian National* case, the less-than-carload argument was made on the need of the railroad to move its traffic across the border from Windsor, Canada, to Detroit, Michigan, adjacent border cities, so that the traffic of the Canadian National motor affiliate

could be interchanged with independent motor carriers in the United States for movements into the interior.[12] In the proceeding under review, however, the Canadian Pacific motor subsidiary doesn't merely want to cross the border to interline with independent U.S. motor carriers. Rather it is seeking to transport traffic well beyond its parent's rail lines into a territory where its parent has never operated. This is not "substituted motor-for-rail" service, as the Commission after reconsideration eventually agreed, nor is it transportation which is assisting the Canadian Pacific's less-than-carload operations within the meaning of section 5(2)(b) of the Act.

Returning to the legislative history of the words "will enable such [rail] carrier to use service by motor vehicle to public advantage in its operations," former I.C.C. Commissioner Eastman, a noted transportation authority, in hearings before the Subcommittee on Interstate Commerce, United States Senate, on S. 3606, 75th Cong., 3d Sess. 23, stated:

> The reason for that proviso was that at the time when this act was under consideration by your committee, there was a feeling on the part of many that railroads, for example, ought not be permitted to acquire motor carriers at all. It was pointed out, in opposition to that view, that there were many cases where railroads could use motor vehicles to great advantage in their operations, in substitution for rail service, as many of them are now doing. Many railroad men, for example, feel that the operation of way trains has become obsolete; that the motor ve-

[12] The Commission, division 3, stated, 109 M.C.C. at 402:

> The evidence is that International has for some time functioned exclusively as a bridge carrier across the international boundary for the purpose of interlining traffic between Transport and United States carriers at Detroit.

> hicle can handle such traffic between small stations much more economically and conveniently than can be done by a way train, and the motor vehicles are being used in that way by many railroads. The same is true of many terminal operations. The motor vehicle is a much more flexible unit than a locomotive switching cars, and it can be used to great advantage and with great economy in many railroad operations.

The above statement by Commissioner Eastman of the intent of section 5(2)(b) does not include the type of operation proposed by the Canadian Pacific here. The motor carrier service will not be auxiliary and supplemental to the rail service of the Canadian Pacific. This is obvious because none of the usual restrictions to insure auxiliary and supplemental operations were sought or could be tolerated by the Canadian Pacific. The motor carrier would not handle, for the most part, shipments which have a prior or subsequent movement by rail. The traffic would not be under rail billing at rail rates. All of the usual restrictions to ensure operations auxiliary and supplemental to the railroad's operations are left out, neither sought by applicant nor imposed by the I.C.C.

CONCLUSION

For the reasons stated, appellant submits that the questions presented by this appeal are of substantial importance and warrant plenary consideration by this Court upon briefs and oral argument.

Respectfully submitted,

PETER T. BEARDSLEY
ROBERT L. JAMES
TODD A. PETERMAN
NELSON J. COONEY
1616 P Street, N.W.
Washington, D.C. 20036

Counsel for Appellant

Dated: February 17, 1976

CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 17th day of February, 1976, I served copies of the foregoing document on the several parties hereto, in duly-addressed envelopes, with postage prepaid, upon the following parties:

1. The Honorable Robert H. Bork, Solicitor General, Thomas E. Kauper, Asst. Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D.C. 20530.

2. Arthur J. Cerra, General Counsel, and Kenneth G. Caplan, Attorney, Interstate Commerce Commission, Washington, D.C. 20423.

3. David G. Macdonald, Francis W. McInerny and Harry J. Jordan, Attorneys, Suite 502, Solar Building, 1000 16th Street, N.W., Washington, D.C. 20036, Attorneys for intervening defendants.

NELSON J. COONEY
1616 P Street, N.W.
Washington, D.C. 20036

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0254

[Filed Oct. 20, 1975, James F. Davey, Clerk]

AMERICAN TRUCKING ASSOCIATIONS, INC.
Plaintiff

vs

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Defendants

and

SMITH TRANSPORT COMPANY LIMITED
SMITHSONS HOLDINGS LIMITED
CANADIAN PACIFIC LIMITED
Intervening Defendants

OPINION

GREEN, District Judge

This action, one of the last to be heard by a three-judge court required by 28 U.S.C. § 2325,[1] seeks to permanently suspend, enjoin, annul and set aside a decision and order of Division 3 of the Interstate Commerce Commission which granted authority to Smithsons Holdings Limited (Smithsons), a subsidiary of Canadian Pacific Limited (Canadian Pacific), for acquisition of

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[1] Pub.L. 93-584, § 7, Jan. 2, 1975, 88 Stat. 1918, repealed this provision of Title 28. Such actions must now be brought in the Court of Appeals. 28 U.S.C. § 2321(A).

Smith Transport (U.S.) Limited. The plaintiff specifically alleges that such decision and order, served October 15, 1974, fails to conform to the Congressional policy set forth in the provisions of Section 5 of the Interstate Commerce Act, 49 U.S.C. §5, and is contrary to the pronouncements of the Supreme Court applying and interpreting that policy. It further alleges that the decision and order is arbitrary and capricious, not in accordance with the law and the evidence, is unreasonable, and constitutes an abuse of discretion.

Plaintiff, American Trucking Associations, Inc. (ATA) is the national trade organization of the independent motor carrier industry, representing all types of motor carriers of property. Canadian Pacific is a carrier by rail subject to regulation by the ICC by virtue of its operation of a small amount of trackage in New England and by its ownership of the controlling interest in the Soo Line Railroad Company. It is required to maintain "less than carload" shipment service (LCL) in Canada.[2] Smithsons is a wholly-owned subsidiary of Canadian Pacific. Smith is a motor common carrier generally restricted to international traffic moving between points in the United States and on the international border between the United States and Canada.

In 1958, Canadian Pacific acquired Smithsons. Smithsons, at that time, owned Smith Transport Limited which had small shipment service to and from interior points in both the United States and Canada restricted by ICC certificate to international shipments. Prior to the purchase of Smithsons' stock by Canadian Pacific, Smith Transport was bifurcated. The operating rights in the new company, Smith Transport (U.S.), were purchased

[2] LCL refers to shipments of small quantities—up to 10,000 pounds—by railroads. As the economies of transportation have changed, such service in the United States by railroads has become all but extinct, supplanted by truck transportation.

by Mr. Phillip Smith. Smith Transport (Canada), owned by Canadian Pacific through Smithsons, was created. The area of operations of each company was restricted to the interior of each country and interchanges occurred at several points on the international boundary. The two companies have maintained a close commercial affiliation since the division in 1958.

Smithsons purchased the stock of Smith (U.S.) on October 25, 1968, after Mr. Smith indicated his desire to leave the trucking business. By trust agreement, legal title was delivered to the Houston National Bank as trustee for the benefit of Smithsons. On November 25, 1968, Smithsons filed its initial petition with the ICC seeking approval of the acquisition under Section 5 and dismissal for lack of jurisdiction because legal ownership, control and actual management of Smith Transport (U.S.) was vested in an unaffiliated non-carrier pursuant to a trust agreement. This argument was rejected by the Hearing Examiner by decision dated March 13, 1970, in which he found that Canadian Pacific exercised control or management within the meaning of 49 U.S.C. § 5(4) and was thus required to obtain prior approval of the acquisition by the ICC under 49 U.S.C. § 5(2)(b).[3] On June 18, 1971, Division 3 affirmed and adopted the Hearing Examiner's decision, an investigation proceeding under Section 5(7) of the Act was instituted, and applicant's petition to supplement its Section 5 application was granted.

A joint hearing was then held on both the Section 5 application and the investigation proceeding which resulted in an Initial Decision dated September 17, 1973, by the Administrative Law Judge (ALJ). In his decision, the ALJ discontinued the investigation in light of

[3] Both the Administrative Law Judge in his initial decision served September 17, 1973, and Division 3 sustained that conclusion and it no longer is an issue in this case.

the action taken in the Section 5 application. The ALJ granted the Section 5 application after finding that the transaction satisfied the three-prong test of the proviso to Section 5(2)(b) which prohibits Commission approval of an acquisition of a motor carrier by a railroad unless it finds:

(1) that the transaction proposed is consistent with the public interest, and

(2) will enable such carrier to use service by motor vehicle to public advantage in its operation, and

(3) will not unduly restrain competition.

By a decision and order served October 15, 1974, Division 3 of the Commission adopted the ALJ's recommendation with one minor exception not pertinent to this case.[4]

A petition filed by plaintiff seeking a finding that the proceeding involved an issue of general transportation importance was denied by the Commission by an order served November 21, 1974. On December 13, 1974, the transaction authorized by the ICC was consummated, the trust was dissolved and the stock of Smith Transport (U.S.) was transferred to Smithsons. On February 25, 1975, plaintiff commenced the instant suit seeking permanently to enjoin and set aside the Commission report and order approving the transaction.

While differing in language used, the parties essentially agree in the statement of the central issues before the Court. These issues are:

[4] The Division corrected the ALJ's inaccurate reference to the operations to be purchased as "substituted motor-for-rail operations". "Substituted motor-for-rail operations" is a term of transportation art referring to the actual replacement by a more efficient motor carrier service of an existing rail service, and is properly sought in a Section 207 application for authority to conduct new motor operations (49 U.S.C. § 207), not through a Section 5 purchase of existing authority and operations.

(1) Whether the ICC may approve an acquisition and control of a motor carrier by a railroad pursuant to 49 U.S.C. § 5(2)(b) without imposing "auxiliary to and supplemental of" restrictions on the operations of the motor carrier to be acquired?

(2) If such approval may lawfully be given, was the Commission's grant of Canadian Pacific's application based on proper findings supported by substantial evidence of record?

All parties recognize the legislative policy underlying the proviso of Section 5(2)(b) to be the promotion and preservation of the motor carrier mode of transportation and the prevention of destructive competitive practices among motor carriers and with railroads. However, it is the Commission's changing implementation of this proviso that presents the crux of the controversy in this case. Plaintiff ATA contends that while unrestricted operating authority may be granted in a Section 207 application[5] to a motor carrier affiliate of a railroad upon a showing of "special circumstances", a corresponding Section 5 application may only be granted to the extent that the acquired motor carrier's operations are "auxiliary to and suplemental of" the railway parent's operations.

Initially, the Commission's policy was to approve only those Section 5 acquisitions where the motor service was closely tied to the rail operations; that is, where motor carriers were "auxiliary to and supplemental of" rail operations. The Commission approved only acquisitions

[5] Section 207 provides for the issuance of certificates of public convenience and necessity to qualified applicants. While that section does not contain the proviso found in Section 5(2)(b), the Commission has read the "auxiliary to and supplemental of" criteria into Section 207 where a motor carrier affiliated with a railroad is the applicant.

of motor carriers that operated along the same route network as the railroad and did not extend operations into other areas not serviced by the railway parent. See, *Pennsylvania Truck Lines, Inc.—Control-Barker*, 1 M.C.C. 101 (1936), supplemented 5 M.C.C. 9 (1937): *Kansas City S. Transport Co., Inc. Com. Car. Application*, 10 M.C.C. 221 (1938), 28 M.C.C. 5 (1941). Plaintiff supports this early Commission interpretation of Section 5(2)(b), urging it as the proper view of the phrase "its operations" found in the second prong of the Section 5(2)(b) proviso.

The Commission followed the policy of imposing the "auxiliary to and supplemental of" restrictions until 1954 when the policy began to change. *In Rock Island Motor Transit Co.—Purchase—White Line Motor Freight*, 40 M.C.C. 457 (1946), 55 M.C.C. 567 (1949), a wholly-owned subsidiary of the Chicago Rock Island and Pacific Railroad sought authority under Section 5(2)(b) to acquire certain unrestricted motor carrier authority. In approving the acquisition, the Commission imposed "auxiliary to or supplemental of" restrictions. This decision was affirmed by the Supreme Court in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). Following this, the railway subsidiary filed a Section 207 application for a certificate of public convenience and necessity authorizing unrestricted operations. In a report by the entire Commission, unrestricted motor carrier rights were granted in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91 (1954). The key language of this report which created the "special circumstances" exception for Section 207 was that the Commission "may issue certificates to motor-carrier affiliates of railroads with or without restrictions as the circumstances may require." (63 M.C.C. at 101). The Supreme Court approved this "special circumstances" exception in the Section 207 context in *American Trucking Assns.* v. *United States*, 355 U.S. 141 (1957).

The Commission has frequently issued certificates to railroad subsidiaries in Section 207 applications without restrictions where "special circumstances" exist; that is, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest. The propriety of the Commission's policy has been specifically approved by the Supreme Court. *American Trucking Assns.* v. *United States*, 364 U.S. 1 (1960) (Section 209 application).

The application of a "special circumstances" exception in a Section 5(2)(b) acquisition proceeding has not been subjected to direct judicial scrutiny.[6] However, the Commission itself has consistently stated that it need not impose "auxiliary to and supplemental of" restrictions on rail carriers seeking approval of Section 5 applications where unrestricted grants are warranted by the factual situation and where the statutory standard of Section 5(2)(b) is otherwise satisfied. See, *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363 (1960); *Canadian National Transportation, Ltd.—Investigation of Control*, 109 M.C.C. 392 (1970).

Plaintiff attempts to dismiss the Section 5 cases unfavorable to its position where auxiliary and supplemental restrictions were not imposed, arguing that they constituted unlawful departure from Congressional policy and therefore not valid precedent for the ICC's action in the instant case. It is well settled, however, that a construction given to a statute by the administrative agency whose duty it is to carry out its provisions is entitled to great weight and should not be overruled un-

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[6] The question was averted in *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133 (1958) where unconditional approval was inadvertently given to a Section 5 acquisition. The Supreme Court approved the Commission's retraction and correction of the certificate to include restrictions. The question posed in this case is noted in footnote 5 at page 140 where the Court expressly intimated no position with regard to it.

less clearly wrong. *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971); *Billings* v. *Truesdell*, 321 U.S. 542 (1944). This limitation on the Court's power of review has been specifically recognized in many decisions involving the Interstate Commerce Act. *Chicago St.P.M. & O. Ry. Co.* v. *United States*, 50 F.Supp. 249 (D.Minn. 1943), aff'd, 322 U.S. 1 (1944); *I.C.C.* v. *Allen E. Kroblin, Inc.*, 212 F.2d 555 (8th Cir. 1954), *cert. denied*, 348 U.S. 836 (1954), aff'g. 113 F.Supp. 599 (N.D. Iowa 1940)

Thus, having determined that it is properly within the discretion of the Commission to approve acquisitions of motor carriers by railroads where special circumstances exist, it is necessary to consider whether the Commission's application of the special circumstances exception was appropriate and whether the applicants otherwise satisfied the standards of Section 5(2)(b). Plaintiff contends that "special circumstances" sufficient to warrant approval of an acquisition without restrictions may be shown only where the services of existing motor carriers in the area involved in the proceeding are inadequate or where the carriers furnish such services only at their convenience. Plaintiff also contends that a mere showing of potential economies or of present financial distress is insufficient to support a finding of "special circumstances".

In Section 207 applications the Commission, with the approval of the Supreme Court, has consistently held that "special circumstances" can only be established upon a showing that a grant of operating authority to a motor subsidiary or affiliate of a railroad will not result in an undue restraint of competition and that the public convenience and necessity require such operation which the authorized independent motor carriers have not furnished except when it suited their convenience. See, *Rock Island Motor Transit Co.*, 63 M.C.C. 91 (1954) aff'd, *American*

Trucking Assns. v. *United States*, 355 U.S. 141 (1957). In Section 5 proceedings, however, the test is not entirely one of public need for the proposed service or the adequacy of existing service. Defendant-intervenors and defendants cite numerous decisions which reject plaintiff's rigid test and leave the finding of special circumstances to the particular facts of the case. See, *Rio Grande Motor Way, Inc.—Control and Merger*, 87 M.C.C. 479 (1961); *Rock Island Motor Transit Co., Extension—Oakbrook, Ill.*, 91 M.C.C. 161 (1962).

In this instance the Commission has found "special circumstances" to exist because of the continuing responsibility of Canadian Pacific to transport LCL traffic and the absence of rail outlets for such traffic in the area served by Smith Transport (U.S.), coupled with the finding that approval of the transaction would be to the public advantage and in no way unduly restrain competition. What constitutes "special circumstances" is dependent upon the facts of each individual case. The scope of judicial review of I.C.C. orders is limited to a determination of whether the Commission's order was within the agency's statutory power and based upon appropriate findings supported by substantial evidence. *Illinois C.R. Co.* v. *Norfolk & W.R. Co.*, 385 U.S. 57 (1966). The finding by Division 3 of "special circumstances" warranting approval of the instant acquisition without restrictions is clearly supported by substantial evidence.

Plaintiff contests only the second of the three findings that the Commission made as required by the proviso of Section 5(2)(b). It does not contest the Commission's finding that the acquisition "will be consistent with the public interest", nor the finding that the acquisition "will not unduly restrain competition". However, plaintiff contends that the Commission's finding that the acquisition of Smith Transport (U.S.) by Smithsons "will

enable the carrier to use service by motor vehicle to public advantage in its operation" was erroneous.

Plaintiff argues that Section 5(2)(b) requires that motor operations of the railroad be used to public advantage in Canadian Pacific's United States operations, and since Smith Transport (U.S.) has no relationship with either the Soo Line in Michigan or the railroad's trackage in Maine or Vermont, it fails to meet the statutory criterion. An analysis of the detailed decision of the ALJ establishes that the "public advantage in its operations" test was carefully considered and applied to the evidence of record. Likewise, the Commission considered both the change in the railroad's position caused by the decline of LCL train service in the United States and the testimony of the applicant's traffic consultant prior to adopting the ALJ's recommendation. The evidence submitted to the Commission clearly supports the Commission's finding that Canadian Pacific will be able to use the services of Smith Transport (U.S.) to public advantage in its operations. The weight of the evidence submitted to the Commission is a matter for the Commission, not for the Courts. The Commission's findings with respect to the acquisition at issue were supported by substantial evidence and its decision is sustained.

/s/ Malcolm R. Wilkey
MALCOLM R. WILKEY

/s/ John J. Sirica
JOHN J. SIRICA

/s/ June L. Green
JUNE L. GREEN

Dated: Oct. 20, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0254

[Filed Oct. 20, 1975, James F. Davey, Clerk]

AMERICAN TRUCKING ASSOCIATIONS, INC.
Plaintiff

vs

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Defendants

and

SMITH TRANSPORT COMPANY LIMITED
SMITHSONS HOLDINGS LIMITED
CANADIAN PACIFIC LIMITED
Intervening Defendants

ORDER

It is by the Court, this 20th day of October 1975,

ORDERED that plaintiff's request seeking to enjoin and set aside a decision and order of Division 3 of the Interstate Commerce Commission should be and hereby is denied; and it is further

ORDERED that plaintiff's complaint be dismissed.

/s/ Malcolm R. Wilkey
MALCOLM R. WILKEY
U.S. Circuit Judge

/s/ John J. Sirica
JOHN J. SIRICA
U.S. District Judge

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX B

Service Date
Oct. 15, 1974

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 7th day of October, 1974.

No. MC-F-10314

SMITHSONS HOLDING LTD.—CONTROL—SMITH TRANSPORT (U.S.), LTD.

No. MC-F-11173

SMITHSONS HOLDINGS, LTD., AND CANADIAN PACIFIC RAILWAY COMPANY—INVESTIGATION OF CONTROL—SMITH TRANSPORT (U.S.), LTD.

Upon consideration of the application filed under section 5 of the Interstate Commerce Act, and the record in the above-entitled proceeding, including the report and recommended order of the Administrative Law Judge, served August 10, 1973, the exceptions filed by protestant American Trucking Association, Inc. and the reply thereto filed by applicants; and

It appearing, That the findings and conclusions of the Administrative Law Judge with respect to all matters of fact and law disposed of in his report are in all respects proper and correct, except as set out in the next appearing paragraph; that the exceptions of protestant and reply of applicants raise no new or material issues of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his report; and that said exceptions and reply, otherwise, are not of such a nature as to require issuance of a report by the

division discussing the evidence in the light of such pleadings;

It further appearing, That the Administrative Law Judge erroneously referred to the motor carrier operation sought to be controlled herein as a "substituted motor-for-rail operation"; that the above-mentioned term for substituted service is a word of art used to refer a motor carrier service actually being substituted for rail service in direct conjunction with other rail service and in which the traffic to be handled by truck has previously moved by rail; that proceedings involving "substituted motor-for-rail service" arise under section 207 of the Act, not section 5 as herein; that in the instant proceeding, the authority sought to be controlled is not a substitution for specific existing rail traffic but is authority which has been in existence for a number of years and with which Canadian Pacific became affiliated in the early 1950's in order to handle traffic that had previous to that time moved by rail but for which rail service no longer available; and that the above-described error in reference does not materially affect the findings and conclusions necessary for approval of the application, as determined by the Administrative Law Judge;

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the reply thereto does not warrant a result different from that reached by the Administrative Law Judge, that the statement of facts, the conclusions and findings of the Administrative Law Judge being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the report and order of the Administrative Law Judge, served August 10, 1973 which would approve the application be, and it is hereby, adopted as that of the Commission, Division 3, effective 20 days from the date of service hereof.

By the Commission, Division 3.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX C

No. MC-F-10314, et al

Service Date
September 17 '73

[ICC Seal]

Interstate Commerce Commission

Certificate of Service

The SECRETARY of the Interstate Commerce Commission hereby certifies that the attached initial decision of the Administrative Law Judge has been filed with and duly made part of the record herein and has this date been served upon all known parties in the manner provided by law and the regulations of this Commission.

Exceptions to said decision, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C. 20423, and served on all other parties of record within 30 calendar days (20 days if there are no other parties) from the date of service shown above. Replies thereto may be filed within 20 calendar days after the final date for filing exceptions. If either date falls upon a Saturday, Sunday, or legal holiday, then the applicable pleading must be filed by the end of the next business day.

If no exceptions are filed to the initial decision, and it is not stayed by the Commission, the initial decision becomes the order of the Commission by operation of law upon expiration of the period for filing of exceptions. The parties to this proceeding are warned that it should not be assumed that the initial decision has become effective as the order of the Commission by operation of law until a notice to that effect has been received.

In addition, any new operation to be authorized by the initial decision, if it becomes the order of the Commission by operation of law, may not be commenced until a certificate, permit, or license, as the case may be, has actually been issued by the Commission. A certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder as specifically set forth in the initial decision.

/s/ Robert L. Oswald
ROBERT L. OSWALD
Secretary

[SEAL]

INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. MC-F-10314

SMITHSONS HOLDING LTD.—CONTROL—
SMITH TRANSPORT (U.S.), LTD.

No. MC-F-11173

SMITHSONS HOLDINGS, LTD. AND CANADIAN
PACIFIC RAILWAY COMPANY—INVESTIGATION
OF CONTROL—SMITH TRANSPORT (U.S.), LTD.

In No. MC-F-10314, acquisition by Smithsons Holdings, Ltd., and in turn by Canadian Pacific Limited, of control of Smith Transport (U.S.) Ltd., through the acquisition by Smithsons Holdings, Ltd., approved.

In No. MC-F-11173, control of Smith Transport (U.S.) Ltd., in a common interest with Canadian Pacific Limited and Smithsons Holdings, Ltd., found to have been effected in violation of section 5(4) of the Act and to be continuing. Investigation discontinued effective with consummation of the acquisition of control authorized in MC-F-10314.

Harry Jordan and *David G. MacDonald* for applicants in No. MC-F-10314 and respondents in No. MC-F-11173.

Nelson J. Cooney for American Trucking Association protestant in No. MC-F-10314 and complainant in No. MC-F-11173.

By JAMES ANTON, *Administrative Law Judge*:

By order dated May 12, 1971, served June 18, 1971, the Commission in No. MC-F-11173 instituted an investigation to determine whether control or management of Smith Transport (U.S.) Limited, hereinafter Smith (U.S.), in common interest with the Canadian Pacific Railway Company, Canadian Pacific, and the Soo Line Railroad Company and Smithsons Holdings Limited, hereinafter Smithsons, a non-carrier holding company, may have been effectuated and may be continuing in violation of section 5(4) of the Act; and by simultaneous order the Commission reopened MC-F-10314 for further hearing and consolidated this application proceeding with MC-F-11173 for oral hearing on a consolidated record.

Pursuant to an order of the Commission of October 22, 1971, the matter was referred to the judge [1] for hearing and the recommendation of an order thereon. Hearing was held on January 10, 1972, at Washington, D. C. Briefs were submitted by applicant and protestants.

Since the filing of the application, the company previously known as the Candian Pacific Railway Company, has changed its name to Canadian Pacific Limited in order to more correctly reflect the fact that the company is a multi-functional company that is a holding company, with the railroad operations being conducted as a division. The company as a corporation is both a rail operating company and a holding company. Applicants have gross operating revenues in excess of $300,000.

BACKGROUND OF THE PROCEEDINGS

By application filed November 25, 1968, Smithsons, a wholly-owned subsidiary of Canadian Pacific, sought con-

[1] At the time of the hearing the hearing officer's title was that of Hearing Examiner, which was changed subsequently to Administrative Law Judge and referred to herein as Judge.

trol of Smith (U.S.), and Canadian Pacific sought concurrent control of Smith U.S. through the transaction. The application was accompanied by a motion to dismiss for lack of jurisdiction, in which the applicants assert that the transaction does not fall within the purview of Section 5 of the Act because Smithsons does not, and does not intend to acquire, control of Smith U.S., and that actual control of the latter is vested in an independent trustee, the Houston National Bank of Houston, Tex.

By order of the Commission, Review Board No. 5, dated December 24, 1968, served January 9, 1969, the application was dismissed on the grounds that Smithsons, a wholly owned subsidiary of the Canadian Pacific Railway Company of Montreal, Quebec, Canada, a railroad subject to Part I of the Act, has purchased all of the issued and outstanding common and preference shares of Smith (U.S.), of Toronto, and the legal ownership and control and actual management responsibility being rested in and fully exercised by the Houston National Bank, of Houston, Tex., pursuant to a trust agreement between Smithsons and the Houston Bank, dated October 30, 1968, also being the date on which the purchase of Smith (U.S.) stock was completed and the stock was placed in trust with the said bank; that therefore the control and management of Smith (U.S.) being vested solely with the said trustee, a non-carrier having no business relationship with the Canadian Pacific, or any other carrier subject to the Act, the transaction is not within the scope of section 5(2)(a).

Thereupon, the American Trucking Association, Maislin Bros. Transport Limited, Hall's Motor Transit Company, Accelerated Transport-Pony Express, Inc., and Eastern Freight Ways, Inc., filed petitions for reconsideration.

By order dated August 18, 1969, served August 25, 1969 the Commission, Division 3, acting as an Appellate

Division, vacated and set aside the order of the Commission, Review Board Number 5, and ordered the proceeding reopened and assigned for oral hearing. The hearing was held in Washington, D. C., on December 1-2, 1969, and a report and order by Hearing Examiner Bernard Feuer, who heard the matter, was issued on March 13, 1970. The Hearing Examiner denied the motion of Smithsons to dismiss the application for control and the petition of protestants requesting divestiture and made the finding that control of Smith (U.S.) by Smithsons and in turn by Canadian Pacific was effectuated in violation of section 5(4) of Act, and recommended the institution of an investigation under section 5(2) of the Act.

Thereupon, applicants filed a petition on February 6, 1971, to reopen the proceeding, amended the application seeking control and requested a further hearing.

In the decision and order served June 18, 1971, the Commission, Division 3, affirmed and adopted the Hearing Examiner's statement of facts, conclusions, and findings that the placing of legal control of Smith (U.S.) under a voting trust arrangement with the Houston National Bank, as trustee, and instructions issued to employees of Smith, Transport Limited, a non-carrier operating in Canada at the time the trust was set up, not to have anything to do with the operation of the American side and not to cross the border, did not effectively divest their management in a common interest with the Canadian Pacific, which, in turn controls Soo Line Railroad Company, both of which are rail carriers subject to Part I of the Act, and the trust arrangement in these circumstances did not realistically insulate the beneficial ownership of Smith (U.S.), through Smithsons, from the Canadian Pacific. Division 3 further acted (1) by treating protestants' petitions for divestiture as complaints for the institution of an investigation proceeding under section 5(7) of the Act and (2) by granting applicant's petition to supplement its section 5 application.

THE APPLICATION

By application originally filed November 25, 1968, authority is sought for control by Smithsons Holdings Limited, of Toronto, Ontario, Canada, of Smith Transport (U.S.) Limited, of Toronto, Ontario, Canada, and for acquisition by Canadian Pacific Railway Company, of Montreal, Quebec, Canada, of control of Smith Transport (U.S.) Limited, through the acquisition by Smithsons Holdings Limited, and the operating rights sought to be controlled are, as follows:

General commodities excepting, among others, household goods and commodities in bulk, as a common carrier, over regular routes, between New York, N. Y., and Albany, N. Y., serving all intermediate points, and the off-route points in New York and New Jersey within 25 miles of New York, N. Y., restricted to traffic originating at, or destined to, points in Canada; between points in New York, serving all intermediate points, restricted to traffic originating at or destined to points in Canada and against traffic moving through the Niagara Frontier; and over numerous alternate routes for operating convenience only; general commodities, in foreign commerce only, between Albany, Utica, and Watertown, N. Y., on the one hand, and, on the other, the boundary of the United States and Canada, serving all intermediate points without restriction as to commodity; and the off-route point of Natural Bridge, N. Y., restricted to the pickup of limestone, and off-route points within 15 miles of Gouverneur, N. Y., restricted to the pick-up of talc; wood pulp, over irregular routes, from Rouses Point and Rooseveltown, N. Y., to points in Vermont, New Hampshire, Massachusetts, New York, and New Jersey, restricted to traffic originating at, or destined to, points in Canada; newsprint, in foreign commerce only, from the ports of entry on the United States-Canada boundary line at or near Rouses Point, Rooseveltown,

and Alexandria Bay, N. Y., to Olean, N. Y., talc from Balmat and Hailesboro, N. Y., to points in Connecticut, Delaware, Maryland, New Jersey, New York, Ohio, and Pennsylvania; in foreign commerce, from ports of entry on the United States-Canada Boundary line, at or near Rouses Point, Rooseveltown, Alexandria Bay, Niagara Falls, and Buffalo, N. Y., to Dunkirk, N. Y.; silver bullion in foreign commerce from Perth Amboy, N. J., to the port of entry on the United States-Canada Boundary line located at or near Alexandria Bay, N. Y.; and aluminum and aluminum products between the plant site of the Alcan Aluminum Corporation at Oswego, N. Y., and junction U.S. Highway 11 and Interstate Highway 81, near Pulaski, N. Y., serving no intermediate points, in foreign commerce.

HISTORICAL BACKGROUND OF SMITH TRANSPORT LIMITED

In 1919, a Mr. Phillip Smith began a motor carrier operation in Ontario, Canada, as a sole proprietor. This was incorporated as Smith Transport Limited (recently changed to Smith Transport Co.) in 1932. Service to Quebec, Canada, was added and subsequently it was decided to extend the operation into international service.

Thereupon, an application for authority was filed with the I.C.C. and a certificate was issued on July 18, 1941, in MC-100463 to transport general commodities, in foreign commerce, over a network of regular routes between Albany, Syracuse, and Utica, N. Y., on the one hand, and, on the other, the international boundary between the United States and Canada at Rouses Point and Alexandria Bay, N. Y., with service authorized to all intermediate points, but restricted to traffic originating at, or destined to points in Canada. Smith was also authorized to serve the international boundary at Cornwall, Prescott, and Landsdowne and the boundary along the Niagara River for operating convenience by the Ontario Transport Board. It also acquired international

service rights from the Province of Quebec to interchange traffic at Lacolle. Service was restricted by both provinces to interlining with the holder of the I.C.C. rights issued in docket No. MC-100463. Up to this point the holder of the I.C.C. rights and the Canadian rights was one and the same company. The carrier continued to expand and by 1958 had extended its operations in Canada to Winnipeg, Manitoba, on the west, and to Halifax, Nova Scotia, on the east. It had also acquired certain other operating rights from the Commission as noted above.

Mr. Smith acquired other motor carrier properties in Canada and on November 7, 1952, Smithsons Holdings was organized. This company acquired the stock of Smith Transport Limited as well as other companies and thereby came into control of the international operation including the rights under MC-100463.

In the late 1950's, the Canadian Pacific approached the stockholders of Smithsons Holdings with an offer to purchase the company in order to acquire its motor carrier operations. A 51 percent interest was acquired on March 11, 1958, as a result of negotiations which began in 1957. Since Smith Transport Limited also held I.C.C. motor carrier authority, Canadian Pacific was advised that it could not acquire control of the United States rights. Therefore, as a condition to the purchase, Smithsons Holdings was required to sell its United States operations. Apparently no consideration was given to filing a section 5 application with the Commission for acquisition of the United States rights.

Steps were then taken to divorce the United States portion of the operation from Smith Transports Limited. In October, 1957 Mr. Samuel P. Smith, one of the four sons of Mr. Phillip Smith, incorporated a company known as Smith Transport (U.S.) Limited. Paid in capital of the new corporation amounted to $450,000,

of which $100,000 was paid by Mr. Samuel Smith for the capital stock, with the balance of the money ($350,000), being contributed by Samuel Smith's three brothers, secured by a five year debenture bearing 6 percent interest per annum.

In performance of Smithsons Holdings responsibility to transfer the I.C.C. rights, it filed on November 4, 1957, the application of Smithsons Holdings and Smith Transport Limited to transfer the I.C.C. authority to Smith (U.S.). By order dated March 26, 1958, served March 27, 1958, the Commission approved the transfer. (Docket Nos. 60678, 60678 A, *Smith Transport (U.S.) Limited, Transferee, and Smith Transport Limited, Transferor*). In May, Smith (U.S.) was issued the I.C.C. rights of Smith Transport Limited under Docket MC-100643 and what theretofore had been a single-line service became two separate services with interchange occuring at the international border.

On December 27, 1960, Canadian Pacific acquired the remaining 49 percent of the stock of Smithsons Holdings and complete control of Smith (Canada). With this acquisition, it became one of the major motor carrier operators within Canada. This motor carrier service has been rendered as a service independent of the rail service and often in direct competition with it.

Subsequently, as shown above, Smithsons Holdings purchased the stock of Smith (U.S.) in 1968,[2] placing it in trust with the Houston National Bank.

THE ISSUES

On the one hand, the Commission institutes a proceeding for the purpose of inquiring into and concerning said violations and all matters connected therewith

[2] By this time Samuel P. Smith had created Samuel P. Smith Holdings, Ltd., in which the stock of Smith (U.S.) was deposited.

or related thereto as provided in section 5(7) of the Act, and if such violations are found, ordering such action to be taken as may be necessary to prevent further violation of said provisions, and, on the other hand, reopens a proceeding to allow applicants to supplement their section 5 application, notwithstanding the fact that in the same order it had concurred in examiner Feuer's findings and conclusions that control of Smith (U.S.) was effectuated and is continuing in violation of section 5(4).

At the reopened hearing, in which the investigation matter was consolidated, there was no evidence adduced by protestants, who were made complainants by the Commission for purposes of the investigation, either as to the investigation or the application. The American Trucking Association did make a preliminary statement that the case now rests on purely legal argument of section 5(2)(b) [3] and that the matter is one of statutory interpretation. This protestant argues that "to use service by motor vehicle to public advantage in its operations, cannot possibly be shown in this proceeding because if the purchase is permitted to go through by the Commission, the railroad parent does not operate any track lines within the United States and therefore its advantage could not be helped by service to and from a point via motor carrier to and from points not on the track line of the railroad." The judge notes, however, it is a matter of record that the Canadian Pacific does

[3] Provided that if a carrier by railroad subject to this part or any person which is controlled by such a carrier or affiliated wherewith within the meaning of paragraph 6 is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

operate a few miles of track in northern Vermont and Maine and controls the Soo Line in northern Michigan.

The posture of the case at this moment, according to protestants, is: "The trust arrangement having been disapproved, the remaining issues are (1) whether the purchase of Smith (U.S.) by Smithsons and Canadian Pacific may properly be approved under section 5(2)(a) and (b) of the Act and (2) whether respondents have already violated the provisions of section 5 so as to make necessary the issuance of an order requiring them to take such action as may be necessary to prevent further violation of the Act."

The applicants submitted evidence to support their section 5 application and further evidence relating to the management activities of the Houston National Bank as trustee.

According to the applicants, the issues are as follows: (1) is the transaction consistent with the public interest, considered without respect to railroad involvement, and (2) will the transaction enable the Canadian Pacific to use service by motor vehicle to public advantage in its operations and without undue restraint of competition.

FURTHER TESTIMONY OF APPLICANT

The recommended report of Examiner Feuer contains an accurate statement of the facts to December, 1969, and therefore they do not need to be restated herein.

The vice-president of the Houston National Bank, who is in charge of the trust department, testified that the trust agreement between Smithsons and the bank is still in force; that the board of directors of Smith (U.S.) under the trust arrangement are still the same; and that constant communication by telephone is maintained between the directors and the chief executive officer of Smith (U.S.) regarding the management of the company.

The bank does not act as trustee for any other motor carrier and the trustee has had no contact with Smithsons, nor has trustee been counseled, advised, directed, or controlled in any way or influenced by the beneficiary (Smithsons) of the trust. Also, there is no business relationship between the bank and the Canadian Pacific.

As chairman of the Board, the vice president of the bank relies upon the advice and experience of an experienced consultant in the field of transportation, who is also on the Board.

The Board sets the policy and goals for the carrier and relies on a chief executive officer to conduct the day to day management of the company. The chief executive is also a member of the Board. The Board meets at least twice a year as reflected by the minutes submitted as exhibit 12 and conducts such business as is required in the operation of the carrier. The business of the Board includes purchase of equipment, sale of equipment, execution of leases and contracts, setting of management salaries, granting of bonuses to employees and the handling any other important decisions or matters required to conduct the business of the carrier.

The chief executive of Smith (U.S.) testified that he confers frequently with the chairman of the Board either by phone or letter and with other members of the Board as well; that the interchange points for traffic are located at Alexandria Bay, Ontario, and Rouses Point, N.Y.; that the principal terminals are located at Buffalo, Syracuse, Albany, and Gouverneur, N. Y., and Hoboken, N. J.; that Smith (U.S.) dispatches equipment just as any other carrier would and does; that it is responsible for its own billing and collection, using Baranicks factors to make divisions of revenue; that it is responsible

for handling claims made against it by shippers; that it leases 200 trailers to Smith-Canada under a conventional industry type agreement; that it performs its own repairs of equipment, except for those repairs which are controlled under the standard EIA trailer interchange agreement whereby a trailer is in the possession of the lessee and in need of repairs; that settlement of receivables is made with Smith-Canada weekly on Friday on an interim basis and on a final basis at the close of the month; that there are no common personnel, terminals or other facilities between the two companies; that the office is located in Toronto because it has always been there and the immigration quota system makes it difficult and time consuming to transfer personnel from Canada to the States; that certain tractors were sold to Smith-Canada at book value to enable the carrier to pull 45 foot trailers and thereby stay within the 55 foot length legal limit imposed by the states of New York and New Jersey (Smith-Canada tractors were not short enough); and that there have been no meetings or communications in writing or otherwise between the chief executive and his staff with any office of Smith-Canada or Smithsons since October 1968, except in the normal course of business, which is the interlining of shipments at the interchange points.

As of November 30, 1971, the balance sheet of Smith (U.S.) shows current assets of $1,386,990 and current liabilities of $1,687,420, with total assets and liabilities of $3,014,471, including retained earnings of $699,194. For the month of November 1971, the net profit amounted to $76,009 as compared with $21,914 for the month of November in 1970 and for the year to date the net profit was $140,539 compared to $41,777 for the previous year.

The vice-president and comptroller of Smithsons testified in order to up date the record and demonstrate some

of the benefits that would accrue to the public and to Smith (Canada) and Smith (U.S.) which would result from control of the latter by Smithsons. He came with the company December 1, 1956, prior to the purchase by Canadian Pacific.

Since the execution of the trust agreement on October 30, 1968, between Smithsons and the Houston National Bank, the Trustee has continued to control and manage the business affairs and operations of Smith (U.S.). The operations of Smith (U.S.) in the United States and the operations of Smith (Canada) in Canada continue to be conducted as two separate operations interlining at the Canada-United States international boundary. There are no common employees. Each company is responsible for billing its respective customers and collecting the amounts due from those customers. Separate sales forces are maintained by the carriers, and each company is responsible for its own claims, safety and maintenance programs.

Shipments interlined between Smith (U.S.) and Smith (Canada) are, of necessity, restricted to international traffic. Northbound traffic exported from the United States is carried by Smith (U.S.) to Rouses Point or Alexandria Bay, N. Y., where Smith (U.S.) maintains terminals. Smith (U.S.) then shunts the trailers across the border to Lacolle, Quebec, and Lansdowne, Ontario, where Smith (Canada) maintains terminal facilities, and Smith (Canada) carries the traffic to its destination. Southbound traffic imported into the United States is handled in the reverse manner, with Smith (Canada) transporting the traffic to Lacolle or Lansdowne. When the Smith (U.S.) employee shunts a northbound load into the Smith (Canada) facility, he takes a southbound load back to the Smith (U.S.) terminal at Rouses Point or Alexandria Bay where it is ultimately dispatched to its destination in the Smith

(U.S.) system or by interline to a point beyond. Because there are no practical alternative interline carriers available at the border crossing points, Smith (U.S.) and Smith (Canada) must work together harmoniously to provide the best possible two-line service in order to compete with the single-line carriers moving international traffic through the same international gateways.

Approval by the Commission of control of Smith (U.S.) by Smithsons Holdings would enable the Smith companies to provide a better service at a reduced cost and result in an improved safety and loss prevention program.

Improved service would result from the elimination of the interline and shunt operation at the border crossing point, where today the average load is delayed about three hours. Further service improvements would result from consolidated or centralized dispatch, which would provide 24-hour, 7-day a week, coverage compared with the present 14-hour, 5-day a week dispatch. A common dispatch system would also enable the carriers to better coordinate their activities and would permit improved utilization of equipment resulting in better service schedules and a larger pool of more diversified equipment available to the shipping public.

With common ownership and control of Smith (U.S.) and Smith (Canada), there would be single-carrier responsibility to the shipping public which would result in improved tracing facilities, more prompt payment of claims and the general elimination of paper work necessitated when two carriers are involved. Single carrier responsibility will enable direct service to be provided on what is now a two-carrier movement, and two-line service where a two-line haul plus a shuttle service is now required.

Elimination of interchange and shunting procedures at the international boundary will reduce costs incurred in the present operation by the elimination of duplicated functions and will permit more efficient handling of customs documentation. Consolidation of dispatch, tracing, claims and accounting functions will improve general administrative efficiency and thereby reduce general administrative overhead costs. Centralized dispatch will also permit more efficient and economical utilization of highway equipment and drivers. In addition, common ownership of Smith (U.S.) and Smith (Canada) will enable Smith (U.S.) to utilize the computer facilities of Smith (Canada) and to enjoy the benefits of Smith (Canada's) bulk purchasing power in such areas as equipment purchases, repair parts, and insurance, among other items. More efficient use of the combined sales forces and maintenance facilities can be made under common ownership, and common control will permit better overall operational supervision resulting in operating efficiencies and an improved load factor.

It is estimated that the consolidation of administrative functions and purchasing power, together with other operating efficiencies, will provide annual savings of approximately $295,000.

While some of the foregoing savings would result from staff reductions, it is expected that the majority of these reductions will occur in the normal course of events due to employee attrition. Nevertheless, most of the reductions will occur in Canada and every effort will be made to ensure the continued employment of all qualified personnel. For those employees remaining with the carriers, there should be significant benefits. Salaried employees will be provided with the same basic pension and other employee benefits enjoyed by Smith (Canada) employees. Opportunities for promotion and advancement will be much greater as members of a larger organiza-

tion. Union contracts will provide adequate protection for the organized employees.

Besides improvements in service, the savings resulting from greater efficiency and the improved opportunities for employees, there are other benefits to be achieved from common control, although such benefits may be of a more intangible nature. For example, Smith (Canada) is a participant in the sophisticated, computerized preventive maintenance program developed by the American Trucking Association known as "Fleet Facts." This program provides superior control over maintenance costs and plays a significant role in Smith (Canada's) safety program. These benefits will be directly available to Smith (U.S.); in fact, the total safety and loss prevention program developed by Smith (Canada) will be available to Smith (U.S.). Similarly, access to a central dispatch that is manned 24 hours a day, 7 days a week, is a safety feature in the event of accidents, storms, and so forth. Furthermore, Smith (Canada) maintains computerized dispatch records which not only provide an excellent audit trail for the movement of all linehaul equipment, but also plays a role in its safety program by controlling excess driving hours.

A break down of the savings to be effected is, as follows: A reduction of $100,000 in the operation of the head office would result from a reduction in the total number of clerks required to conduct the head office functions, estimated at $35,000 per year. Smith (U.S.) would be able to utilize the services of Smith-Canada's computer, reducing costs by $30,000 per year; and common office facilities would result in a further reduction in costs of $35,000 per year. Elimination of the present interchange requirements at the international border where northbound traffic, for example, comes to the Smith (U.S.) terminal and the trailer is then shunted across the border and then picked up by a Canadian

highway driver to go to destination, the reverse being true for Southbound traffic. A through line operation would avoid costs incurred at the international border, and as a result of the reduction in drop-and-hook payments to the highway drivers and the elimination of the shuttle operation, an estimated savings of $85,000 per year would occur. Approximately $50,000 a year could be saved from economies that could be developed by a through line operation through improved load factors. Smith (U.S.) could take advantage of the bulk purchasing power of Smith-Canada and as a result of the combined purchasing power, the cost of insurance, parts, etc., could be reduced by $20,000 per year. Finally, the use of common employees in dispatching would result in a reduction of costs of another $20,000 per year. This totals $270,000 per year. A concomitant result of this would undoubtedly result in lowering costs to shippers of freight being shipped by a reduction of tariffs.

The vice president of Canadian Pacific Express, a subsidiary of Canadian Pacific, testified that rail LCL traffic between Canadian and U.S., points declined drastically from 1950 to 1969. When the New York Central Railroad discontinued handling LCL traffic, Canadian Pacific had no way of sending LCL traffic in to the United States or receiving it from the United States.

Approximately 70 percent of the small shipment traffic presently moves by highway in Canada. Canadian Pacific's motor carrier subsidiaries transport a significant share of it and compete with many Canadian carriers who are owned by American motor carriers. Also, they compete with American carriers who operate a single line service into Canada, such as Hall's Motor Transit.

Acquisition of Smith (Canada) gave Canadian Pacific a network of motor carrier routes in Canada to meet

Canadian motor carrier competition and United States motor carriers' expanding operations into Canada. While competing motor carriers were able to offer single-line service between Ontario and Quebec and the United States, Smith (Canada) is limited to a two-line service in connection with Smith (U.S.). When the service of Smith (U.S.) began to deteriorate in the late 1960's because its owner was unable to devote full time and attention to the carrier's business, Smithsons Holdings naturally was anxious to acquire an interest in Smith (U.S.) to preserve it as a connection for Smith (Canada).

Stock ownership of Smith (Canada) and ownership of a beneficial interest in Smith (U.S.) has enabled Canadian Pacific to meet, in part, its obligation under its Canadian authority to transport LCL freight and has permitted it to participate in LCL movements between Canada and United States points, particularly those in New York served by Smith (U.S.). Absent this motor carrier service, Canadian Pacific could not effectively participate in LCL traffic between the two countries because no rail connections are available for such traffic, and the express service of Canadian Pacific Express in connection with Railway Express is less than satisfactory. Besides benefiting Canadian Pacific in its operation by handling its LCL traffic, the motor carrier service has also resulted in economies and efficiencies for the railroad because it has replaced Canadian Pacific's more expensive and less efficient boxcar operations. In this connection, it is noted that in 1969 terminals were opened in Montreal and Toronto which are designed primarily as highway transport facilities. These terminals have only a restricted number of boxcar berths. Direct control of Smith (U.S.) and Smith (Canada) and their operation as a single-line service will result in additional savings and, in turn, enable Canadian Pacific

to use motor carrier service to further public advantage in its operations, according to this witness.

As of October 31, 1971, the balance sheet of Canadian Pacific shows assets and liabilities of $2,349,203,000 with current assets amounting to $243,345,000 and current liabilities $216,744,000, and retained income of $782,874,-000. For the ten month period ended October 31, 1971, the income amounted to $44,784,000.

The corporate structure of Canadian Pacific shows a chairman of the company, a president and chief executive officer, and a vice president of the company, all on the board of directors which is comprised of 23 persons with five of the directors being members of the executive committee. There are three divisions headed by various officers and include Corporate Services, Canadian Pacific Rail and Transport and Ships.

There are four major breakdowns of the Canadian Pacific family; (1) Canadian Pacific Rail, (2) Canadian Pacific Air, (3) Canadian Pacific Investments, Limited (non-transportation), and (4) Transport in ships (including also truck transportation and telecommunications).

The balance sheet further shows the following investments, at cost, (in thousands): Canadian Pacific Investments Limited, $321,606, Canadian Pacific Air Lines Limited, $30,000, other subsidiary companies (includes motor carriers), $203,474, and other investments, $40,-850. Also, the assets include the total investment before depreciation in properties, at cost, (in thousands) of the following: Railway $2,435,857, telecommunications $137,200, steamships $50,857, Hotels $25,579, and other $10,685. The total of the property account is $2,660,178 less depreciation of $1,249,225, leaving $1,410,953. Smithsons would be included in the accounts labeled "other."

Smithsons balance sheet as of September 30, 1971, shows assets and liabilities of $26,252,541, with current assets of $5,359,579 and current liabilities of $5,017,221, and retained income of $4,777,074. The balance sheet also shows investment in trustees owned subsidiary at $1,740,859, which is the cost plus capitalization of the earnings of Smith (U.S.) since the day the shares were originally purchased. For the nine months ended September 30, 1971, the consolidated net income of Smithsons amounted to $366,404.

As a matter of accounting treatment, it was determined by the professional accounting firm of Price, Waterhouse that the net earnings of Smith-U.S. should be reflected somewhere in the financial records of Smithsons. Therefore, the retained earnings are included in the investment account.

The company is divided into (1) domestic Transport Operations and (2) International Services. The first group includes Smith Transport Limited, H. Smith Transport Limited and Norman's, which is the Smith-Canada operation referred to herein and is a common carrier operating in Canada handling both domestic and international traffic. The first is an inter-province and international traffic operator; the second is an intra-provincial carrier in Ontario and the third operates between Montreal, Quebec and Cornwall, Ontario. The second group is called Highland Transport Co., and is specialized truckload carrier operating primarily in Ontario. The third is called De Luxe Transportation L&D and is in the furniture moving and storage business operating out of North Bay, Ontario. The fourth is called Transport Terminals Ltd., and is a container port operator at Wolf's Cape, Quebec.

The International Services division includes Commercial Customs Brokers Ltd., which is a customs brokerage service on importation of international traffic

into Canada; Intermediate Terminals, which operates sufferance warehouse facilities in Canada where international shipments are stored pending customers inspection; United Cargo Corporation (Canada), which is involved in moving overseas traffic via containers; and Universal Container Services, which operates as a ship's agent for movement of traffic via containers and shipping lines.

The revenue for Smithsons two divisions for the nine month period ended September 30, 1971, amounted to $3,179,422 for Domestic Transport Operations and $299,515 for International Services, or a total of $3,478,-937. The operating revenues for Smith, H. Smith and Norman's (Smith-Canada) for the same period amounted to $2,734,633. Of this revenue, approximately 12 per cent can be attributed to the interline arrangement between Smith-Canada and Smith (U.S.), or approximately $325,000.

By the middle of the 1950's it had become evident that there was a serious erosion of L.C.L. railway traffic; which was caused by the better service that could be provided by truck transportation. Therefore, the officials of Canadian Pacific believed it to be only natural to invest in a trucking operation and it seemed like a good investment as an alternate method of handling its L.C.L. traffic. Since Smith-Canada operated primarily in Ontario, Quebec, New York and New Jersey and was expanding to Winnipeg, Manitoba to the west and down the east coast to Halifax, Nova Scotia and with its ability to handle both domestic and international freight, Canadian Pacific decided that it should buy an interest in Smithsons in 1958.

Applicant submitted testimony through a traffic consultant with exhibits to show how railroad handling of LCL traffic decreased in the United States substantially from 1950 to 1969 and ultimately the handling of this

type of traffic was abandoned by cancelling of tariffs. This was also true of Canadian rail carriers. For example the total tons of LCL traffic carried by the New York Central, the line principally involved in the movement of the traffic to and from Canada jointly with the Canadian Pacific, decreased from 1590.4 (thds) in 1950 to 4.4 (thsds) in 1967 or almost 100 per cent. The gross freight revenues decreased from $34.0 million in 1950 to $.12 million in 1967. However, motor carrier traffic in LTL shipments during this period increased substantially.

The Canadian Pacific contrary to U. S. carriers had a statutory obligation to handle LCL traffic in Canada. It decided that if it were to meet its obligation to transport LCL traffic, it must acquire a motor carrier operation, and to preserve its participation in Canadian-United States LCL traffic that motor carrier should be able to participate in the handling of traffic to and from the United States. Thus, the negotiations for the purchase of Smithsons was begun. The acquisition of Smith-Canada made it one of the major motor carrier operators within Canada. This service is operated independently of the rail service and often in competition with it.

In 1958, Smith (U.S.) transported 168,000 tons with gross operating revenue of $2,555,000 and by 1970 this was increased to 323,000 tons and $6,063,000 in revenue. Eastern Freightways transported in 1958, 283,000 tons with revenue of $6,829,000 and in 1970, 1,091,000 tons with revenue of $26,873,000. Maislin Brothers in 1958 transported 181,000 tons with revenue of $4,906,000 and in 1970, 976,000 tons with revenue of $33,654,000. Maislin Brothers (U.S.) transported in 1958, 37,000 tons with revenue of $1,118,000 and in 1970, 113,000 tons with revenue of $2,174,000. Accelerated Transport transported in 1958, 223,000 tons with revenue of $5,516 and in 1970, 369,000 tons with revenue of $7,128,000.

Hall's Motor Transit in 1958 transported 562,000 tons with revenue of $13,322,000 and in 1970, 1,104,000 tons with revenue of $40,194,000. The traffic and revenue of protestants has increased substantially during the period shown above, keeping pace in some instances with applicant and in other instances growing two or three times as much.

The present president of Smithsons and also of Smith Transport Ltd. was appointed in April 1962. Prior to this he was the manager of the Department of Research for Canadian Pacific and participated in the negotiations for the acquisition of Smithsons stock.

On December 1971, there occurred a modification to the name of Smith Transport Limited as a result of a statutory amalgamation of four Ontario incorporated companies: (1) Smith Transport, Limited; (2) a corporation known as Strathdee Transport, Limited; (3) Lawson Transport, Limited (both of the latter companies were inactive trucking companies whose franchise had been taken over by Smith in previous years); and (4) Terminal Realty and Investments, Ontario, Limited, which owns all the real estate in Ontario used by Smith in its motor carrier operation. The name of the new company is now Smith Transport Co., Limited (Smith-Canada).

As stated before, in 1957, Canadian Pacific began negotiations to purchase Smithsons Holdings and in 1958 entered into a contract to purchase 51 percent of the outstanding stock. The contract was contingent upon the prior divestment by Smith Transport Limited of all of its operating authority as issued to it by the Commission together with all of its assets located in the United States and used in connection with its American motor-carrier operations; including 115 pieces of equipment.

Thereupon Samuel, one of the Smith Brothers, created a corporation called Smith Transport (U.S.) Limited in order to purchase the operating rights and on November 4, 1957, it filed a 212(b) application. (See historical background section supra.)

On March 11, 1958, Canadian Pacific purchased 51 per cent of the stock of Smithsons. This was in violation of section 5(4) of the act. The application for transfer of the operating rights and purchase of all assets was approved by the Commission on March 26, 1958. The purchase price was $285,000. The certificate was transferred on May 28, 1958.

The approval of the application by the Commission did not cure the violation of section 5(4). The ownership of 49 percent of Smithsons by the same persons who owned the new U. S. carrier Smith (U.S.), created a situation whereby an unapproved affiliation with the Canadian Pacific existed.

Even though the Commission authorized the transfer and states in the order that the transaction is not subject to section 5 of the act, nonetheless the violation was not cured and continued to exist by virtue of the affiliation between the owners of the 49 percent of the stock of Smithsons, one of whom also owned 100 percent of Smith (U.S.), a motor carrier, and Canadian Pacific, a railroad, the 51 percent owner of Smithsons. The illegal control situation of Smith (U.S.) by the Canadian Pacific continued to exist since no section 5 proceeding had ever been instituted to make a finding whether or not the control by the railroad was consistent with the public interest and that the transaction will enable the railroad to use service by motor vehicle to public advantage in its operation and will not unduly restrain competition.

On December 27, 1960, the Canadian Pacific acquired the 49 percent of Smithsons owned by the Smith Brothers, and it appeared that the violation was cured.

The rules for the transfer of a certificate under 212(b) at that time provided for approval of a transaction if it appears that the proposed transaction is one which is not subject to the provisions of section 5. The application filed by Smith contained the disclosure that the transferee Smith U.S. would still be a 49 percent owner of Smithsons and therefore an affiliate of the Canadian Pacific. No one apparently addressed himself to this problem.

After Smith (U.S.) acquired the operating rights and American assets of Smith Transport, Limited, it became a fully operative company and terminal operations in the U. S. previously conducted by the latter company were now conducted by Smith (U.S.). Also, the movement of international traffic that was previously conducted as a single line operation became an interline operation at the international border. The stock in this company—Smith (U.S.)—was subsequently placed in a holding company known as Samuel P. Smith Holdings, Ltd., until the stock was acquired by Smithsons in 1968 and placed in trust with the Houston National Bank.

From 1958 until early 1962 Mr. Samuel P. Smith continued as president of both Smith-Canada and Smith (U.S.). In 1962, Mr. Smith restricted his activities to the operations and management of Smith (U.S.) and a new management took over Smith-Canada. Thus, the section 5 violation continued until 1962 because of the interest in common by virtue of the close relationship and management of the two companies.

Mr. Samuel Smith resigned as President of Smith-Canada in April, 1962, and established separate offices and facilities for Smith (U. S.), which he then managed exclusively.

From April, 1962, to April, 1966, the movement of international traffic was conducted by the combination

of Smith Canada and Smith (U.S.) with separate management. A decline in the quality of through service between Canada and United States points was experienced, particularly in meeting the competition for international traffic provided by single-line carriers.

An analysis of Exhibit 22, shows that tonnage of Smith (U.S.) was 230,000 tons and reached a peak of 475,000 tons in 1963 and thereafter declined to 230,000 tons in 1967, whereas the tonnage of Eastern, Maislin and Hall's increased year after year substantially. The tonnage for Accelerated decreased slightly during this period, but by 1967 had begun to increase substantially.

In an attempt to improve the through service on United States-Canada traffic, effective April 1, 1966 Smith-Canada created an International Division for the sole purpose of handling traffic interlined with Smith (U.S.) and appointed Mr. Samuel Smith as the manager of the Division. He remained as manager of this division and continued as president of Smith (U.S.) until June, 1968, at which time he decided to sell Smith (U.S.) because he had other business commitments which prevented his spending the time required to operate Smith (U.S.). There was no reason or incentive to continue to operate Smith (U.S.) because he had no male heirs. On the other hand, Smith-Canada had participated in the movement of international traffic since 1941 and expected to continue in business for an indefinite period. Because part of the franchise of Smith-Canada restricted its participation in international traffic to that traffic interlined with the holder of I.C.C. certificate MC-100463 Smith (U.S.) and since it was evidence (sic) that it desired to insure the continued successful operation of Smith (U.S.), Mr. Smith approached the president of Smith-Canada relative to the sale of Smith (U.S.).

Also, Smithsons wanted to protect the international traffic that had been built up and so entered into the agreement with Samuel P. Smith Holdings to purchase the shares of Smith (U.S.) and place them in trusteeship with the Houston National Bank.

Upon advise of Counsel, it was decided to use the procedure of using a trust to insulate Smithson (Canadian Pacific) from control and submit the matter to the jurisdiction of the Commission.

The purchase price of the stock ($1,613,192 after adjustments) was arrived at through arm's length negotiations. As of September 30, 1968, Smith (U.S.) had total assets of $1,756,755, total liabilities of $1,162,877, and a net worth of $593,878. (Appl., Exh. B-2) For the nine month period ending September 30, 1968, Smith (U.S.) had an estimated loss, before taxes, of $37,610 on gross revenue of $5,503,681. In 1967, Smith (U.S.) earned only $175 and in 1966, it lost $18,125. Under the trust Smith (U.S.) had after tax earnings of $81,-881 in 1969, $42,024 in 1970, and for the first 11 months of 1971, a net income of $140,539. (Appl., Exh. D.; Exh. 14) The net worth of Smith (U.S.) increased from $593,878 at September 30, 1968, to $764,878 at November 30, 1971, (Exh. 13) Acquisition of the stock of Smith (U.S.) by Smithsons Holdings resulted in no increase in the total fixed charges of Smith (U.S.), and there was no guaranty or assumption of the payment of any payment of any dividends or fixed charges as a result of the transaction. In passing it is pointed out that both Smiths Holdings and CP are in sound financial condition. Smithsons Holdings net worth at September 30, 1971, was $5,354,074 (Exh. 19), and that of CP was $1,400,845,000 at October 31, 1971. (Exh. 15)

According to applicant, the continued use of the two carrier operation is plagued with difficulties, some of

which arise from border-crossing types of legal requirements and some operations in nature such as coordinating northbound and southbound schedules.

Canadian customs procedures are more suited to the free flow of intra-border commerce than those in the United States. Goods inbound to Canada may be cleared at the border or at one of the approved Inland Highway Sufferance Warehouses. The Sufferance Warehouses are a beneficial aid to the smooth flow of traffic because they relieve congestion at the border and can offer the service of specialized customs personnel. The major difficulty arises with United States border practices because most goods must be cleared at the border.

The legal burdens recited on pgs. 16-17 of applicants briefs are not in evidence nor is there an explanation of the manner in which Smith (U.S.) has been adversely affected by any of the five items listed. Most of it does not appear to be applicable. In fact, there would be more burdens to be faced by Smith (U.S.) as a Canadian carrier.

Smithsons contemplates operating the two companies as separate divisions, but still believes economies and efficiencies would be accomplished.

In the opinion of the vice president of Canadian Express, unless Canadian Pacific is afforded an opportunity to extend its operation into the gateway of New York City, it will lose or stands to lose its ability to participate in this international traffic—in which it has had historically an interest—on a basis similar to that now available to the American motor carriers in this area.

Protestants submitted no exhibits of operating authority and one witness for Maislin Brothers in the original hearing testified that his company could not serve all the points Smith (U.S.) was able to serve and that one

protestant would have to tack at Reading, Pa. and another at Boston, Mass., to handle the New York traffic bound for Canada.

DISCUSSION AND CONCLUSIONS

Even though the Commission authorized the transfer of the American portion of the rights of Smith Transport Limited on March 26, 1958, and ostensibly created a motor carrier separate and apart from the Canadian operation, there has never been a clear cut demarcation between the two carriers until the trust was created. By purchasing 51 percent of Smithsons Holdings which controlled Smith Transport Limited, on March 1, 1958, Canadian Pacific had the power to control the newly created carrier (Smith-U.S.) until December 27, 1960, when Canadian Pacific purchased the remaining 49 percent of Smithsons Holdings. This was true because of the affiliation situation whereby the owner of Smith (U.S.) was still an owner of 49% Smithsons Holdings together with his brothers.

Also, there was a common interest between the two motor carriers because Mr. Smith who was owner and operator of Smith (U.S.) also was the president of Smith-Canada from 1958 until April 1962. So the power to control still had not been eliminated.

For the next four years the quality of through service between United States and Canadian points declined, which led to the creation of an International Division by Smith-Canada and the placing Mr. Smith in charge as manager. This reinstated the common interest situation that had existed from 1958 to 1962. This condition continued to exist until October 30, 1968, when the stock of Smith (U.S.) was purchased by Smithsons Holdings and placed in trust with the Houston National Bank. Thereupon application for approval of the acquisition under section 5(2)(a) of the Act was filed on November 25, 1968.

It was only after Review Board No. 5 had dismissed the application as not being within the purview of Section 5(2)(a) and protestants had filed petitions for reconsideration which the Commission granted setting aside the action of Review Board No. 5, and reopened the case and ordered a hearing, that question of a possible violation of section 5(4) of the Act was considered.

The doctrine of laches or estoppel cannot be invoked against the Commission. See *Sims Motor Transport* v. *U.S.*, 183 F. Supp. 113, 119. Nevertheless in the opinion of the judge control or the power to control has always existed, except for brief periods of time as outlined above. Thus, one could say the situation in reality has never been any different than it was prior to the issuance of the certificate to Smith (U.S.). In other words there was never a break in the relationship between Smith-Canada and Smith (U.S.)

The creation of the voting trust in October 1968 created a new situation.

Protestants argue that *East Texas Motor Freight-Control-Consolidated*, 109 M.C.C. 217 (1969) makes it abundantly clear that attempts to establish so called "voting trusts" without prior Commission approval, will not be looked upon favorably. Until October of 1969, when this decision was issued, the controlling case, among others, was *Missouri-Pac. R. Co.-Control-Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965), which not only condoned a violation, but set out the elements of a valid trust which would effectively accomplish avoidance of control. These elements are found at 327 I.C.C. 319-20 and are as follows: "(1) The trustee must be entirely independent of the beneficiary of the trust; (2) The trustee must exercise its voting power in such a way as not to cause any dependence or intercorporate relationship between the beneficiary and the carrier trusteed; and (3) The trust must be irrevocable for a stated

period of time." There are also many other decisions approving the use of a trust to insulate a carrier from a charge of having unlawful control of another.

Here, the trust was established prior to the East Texas case, thus, one cannot apply that case and others appearing subsequently, retroactively. At the time, the transaction was accomplished in good faith in reliance on past Commission decisions and met the established tests.

A review of all of the evidence herein since the establishment of the trust indicates that the operation of Smith (U.S.) by the trustee cannot be construed to show Canadian Pacific is exercising control of the motor carrier or has the power to control. It is conceivable that in any given situation analagous to this one that a person could dream up ways in which the power to control may be shown. There is no evidence in this record to prove this unless one takes the conjecture and speculation of possibilities of an historical relationship between two managements as laying the foundation for the power to control, and which was arrived at circumstantially in the first hearing. The more recent record however clearly shows this not to be the case.

Therefore, the violation occurring from March 1958 to October 1968 (excepting 1962-1966), is what must be dealt with herein and although not condoned the judge concludes the investigation should be dismissed in light of the decision reached in MC-F-10314.

Now, we turn to the matter of the section 5 application in MC-F.10314.

Prior unlawful control is not necessarily a bar to approval of a transaction under section 5 of the act, especially where the evidence clearly establishes that approval would be in the public interest. *Atlas Van Lines, Inc., Control and Merger*, 75 M.C.C. 175.

A review of the legislative history of section 5(2)(b) quoted *supra* reveals that the purpose of this section (Section 213(a)(1) when originally passed in 1935) was to make it possible for the Commission to allow acquisitions of motor carriers by railroads upon a showing that the transaction met the requirements of the section and to protect the public against the monopolization of highway carriage by rail, express or other interests and make for coordinated or more economic service at the same time. (79 Cong. Rec. 5882 (1935).

Over the years the Commission has not looked with favor on acquisitions of motor carriers by railroads. Railroads have been authorized to provide substituted motor for rail service and have been allowed to acquire motor carriers with certain restrictions.[4]

The Commission has authorized acquisition under section 5 of the act without imposing restrictions noted above, under special circumstances. This principle was first enunciated in *Rock Island Motor Transit Co.-Purchase-White Line Motor Frt.*, 40 M.C.C. 457 (1946) and 55 M.C.C. 567 (1949), as affirmed by the Supreme Court in United States v. Rock Island Motor Transit Co., 340 U.S. 419 (1951), which stood for the proposition that

[4] These conditions are (1) that the motor service shall be auxiliary and supplemental to that of the railroad, (2) that service shall be provided only to points which are stations on the rail line, (3) that shipments shall be limited to those which it receives from or delivers to the railroad under a through bill of lading covering, in addition to a movement by applicant, a prior or subsequent movement by rail, (4) that all contractual arrangements between the motor subsidiary and the rail parent shall be reported to the Commission and be subject to its revision, if necessary, and (5) that the Commission reserves the right to impose additional conditions, if found necessary, to insure that the motor service will remain auxiliary and supplemental to that of the railroad. The third restriction is sometimes replaced by a condition that the motor operations shall not be conducted to, through, from, or between more than one of certain specified key points.

the Commission did not lack the power to approve a transaction such as this without imposing the restrictions.

In *Rock Island Motor Transit Co. Com. Car., Application*, 63 M.C.C. 91, 101 (1954), the Commission restated the principle that it "may issue certificates to motor-carrier affiliates of railroads with or without restrictions as the circumstances may require." See also *Burlington Truck Lines, Inc.-Purchase-George R. Pirnie and James Pirnie*, 85 M.C.C. 363 (1960), wherein the Commission reviews in detail the background and history of this revised statement of policy as first enunciated in the 1954 Rock Island case, supra.

The Commission further states at P. 368 of the Burlington case: "The only change which has occurred in the statutory burden of proof in cases such as this since 1935, was in 1940, when, in reenacting section 5 to make it applicable to all carriers subject to the act, the words 'will promote the public interest,' appearing in former section 213 of the Motor Carrier Act, 1935, were changed to 'will be consistent with the public interest.'"

However, there was another change which should be noted. The words after the word interest "by enabling such carrier" were changed to "and will enable such carrier." A reading of the committee reports of congress discloses that this language change was merely a minor grammatical one and not of substance.

The record herein meets the burden that the continued operation of the all motor-service of Smith (U.S.) will not result in the undue restraint of competition and it is clearly shown the public interest requires the proposed operation.

A recent decision analogous to the proceeding here is the *Canadian Natl. Transp.—Investigation of Control*—109 M.C.C. 392, where the Commission at p. 403 states:

"The acquisition of control of International by Transport would vest ultimate control of International in a rail carrier. The interposition of a holding company as a link in the chain of ownership does not alter the applicability of the special restrictions surrounding acquisitions of motor carriers by a railroad. The statutory standard of proof set forth in the proviso to section 5(2)(b) of the act requires not only the showing in such cases, that the proposal is consistent with the public interest, but also, that it will serve the public interest by enabling the acquiring carrier 'to use the service by motor vehicle to public advantage in its operation' and must further show that the acquisition will not restrain competition. *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101, and 5 M.C.C. 9, and 49."

Although Canadian Pacific must by law continue to provide LCL service in its Canadian operation and we have no jurisdiction over this portion of its operation, it cannot be overlooked that the motor carrier service in the United States is part of substituted motor-for-rail operations in the movement of small shipments between the two countries and therefore to public advantage in rail service, to say nothing of the increased advantage to the shipping public in efficiencies of movement of shipments, tracing of shipments, speed of delivery, etc. It is therefore clearly in the public interest to approve the application without restrictions.

Even though the evidence shows no curtailment of employment nor is reduction of wages contemplated by Smithsons of employees of Smith (U.S.), the judge is of the opinion that the Commission should reserve jurisdiction for a period of 3 years from date of consummation herein, to make such additional findings and impose such terms and conditions with respect to employees of the carrier involved in this transaction, as may be

necessary, and lawful, if, upon petition by them, or their representatives, within that period it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done, pursuant to, or as a direct result of the consummation of this transaction pursuant to authority herein granted. Consummation of the transaction by applicants will be considered acceptance of the reservation of jurisdiction by the Commission in this connection.

The nature of this transaction is such that the quality of the human environment will not be significantly affected within the meaning of the Environmental Policy Act of 1969. The briefs filed by the parties have been considered.

ULTIMATE FINDINGS AND ORDER

In No. MC-F-10314, upon consideration of all evidence of record, the Administrative Law Judge finds that control by Smithsons Holding Limited, of Toronto, Ontario, Canada, and for acquisition by Canadian Pacific Limited, of Montreal, Quebec, Canada, of control of Smith Transport (U.S.) Limited, through the acquisition by Smithsons Holdings Limited, will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage, in its operations and will not unduly restrain competition; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

In No. MC-F-11173, upon consideration of all of the evidence of record, the Administrative Law Judge finds such proceeding should be discontinued.

Premises considered it is the ORDER, of the Administrative Law Judge, That in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof.

It is further ordered, In No. MC-F-10314, that the control by Smithsons Holdings Limited and acquisition by Canadian Pacific Limited, of control of Smith Transport (U.S.) Limited, through the acquisition by Smithsons Holdings Limited, through purchase of capital stock be and they are hereby approved and authorized subject to the terms and conditions herein set forth;

It is further ordered, In No. MC-F-11173, said proceeding be, and it is hereby, discontinued;

It is further ordered, That upon approval and consummation of the transaction proposed herein, the parties shall promptly (1) take such steps as will insure compliance with section 215, 217, and 221(c) of the Interstate Commerce Act, and the rules, regulations and requirements prescribed thereunder, and (2) confirm in writing to the Commission immediately after consummation, the date on which consummation has actually taken place;

It is further ordered, Except as herein authorized, the said capital stock of Smith Transport (U.S.) Limited shall not be sold, pledged, repledged, or otherwise disposed of by Smithsons Holdings Limited, or other applicants, unless or until so ordered or approved by this Commission;

It is further ordered, That nothing herein authorized shall be construed to imply any guarantee or obligation as to said securities, or interest thereon, on the part of the United States;

It is further ordered, That the recital in this report of financial data of the parties, shall not be construed as

approving any accounting methods which have been followed or expenditures represented thereby;

It is further ordered, That if the authority herein granted is exercised, Smithsons Holdings Limited and Canadian Pacific Limited, shall each submit for consideration a sworn statement and one copy thereof, hereby required within 60 days after the consummation of the transaction, showing all expenditures made, by dates, or to be made in connection with the transaction herein authorized, including the consideration, legal and other fees, commissions, witness fees and expenses, and any other costs incidental to the transaction, the assets acquired and liabilities assumed, including loans incurred to consummate the transaction indicating the account number and title to which each item has been, or is to be, debited and credited;

It is further ordered, That the Commission shall retain jurisdiction of the transaction for a period of 3 years from date of consummation, in order to make such additional findings and impose such terms with respect to employees of Smith Transport (U.S.) Limited, as may be necessary, and lawful, if, upon petition by them, or their representatives, within that period it is shown that the condition of their employment or interests incident thereto have been or will be adversely affected by anything done or proposed to be done, pursuant to or as a direct result of the consummation of this transaction pursuant to authority herein granted and the consummation of the transaction by applicants will be considered acceptance of the reservation of jurisdiction by the Commission in this connection.

It is further ordered, the authority herein granted shall not be exercised prior to the date of service of a notice or order stating that this recommended order has become the order of the Commission;

It is further ordered, That unless the authority herein granted is exercised within 90 days from the date of service of said notice or order, this order shall be of no further force or effect;

Dated at Washington, D.C., this 10th day of August, 1973.

By the Commission, James Anton, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary

[SEAL]

Filed Dec. 18, 1975

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-0254

AMERICAN TRUCKING ASSOCIATION, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that AMERICAN TRUCKING ASSOCIATIONS, INC., plaintiff in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on the 20th day of October, 1975, dismissing its complaint to set aside and annul a report and order of the Interstate Commerce Commission. This appeal is taken pursuant to Sections 1253 and 2101 of the Judicial Code, 28 U.S.C. §§ 1253 and 2101.

Respectfully submitted,

PETER T. BEARDSLEY
ROBERT L. JAMES
NELSON J. COONEY
1616 P Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Nelson J. Cooney, one of the attorneys for appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the eighteenth day of December, 1975, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing copies, in duly-addressed envelopes, with first-class postage prepaid, to Honorable Edward H. Levi, Attorney General of the United States; Honorable Robert H. Bork, Solicitor General of the United States; Honorable Thomas E. Kauper, Assistant Attorney General of the United States; John H. D. Wigger, Esq., Department of Justice, Washington, D.C. 20530; and Earl J. Silbert, United States Attorney for the District of Columbia, Washington, D.C. 20001.

2. On the Interstate Commerce Commission, by mailing copies, in duly-addressed envelopes, with first-class postage prepaid, to Fitz R. Kahn, General Counsel, and Kenneth G. Caplan, Esq.. Interstate Commerce Commission, Washington, D.C. 20423.

3. On Smith Transport Co., Ltd., Smithsons Holdings, Ltd., and Canadian Pacific, Ltd., intervening defendants, by mailing copies, in duly-addressed envelopes, with first-class postage prepaid, to David G. Macdonald, Esq., Francis W. McInerny, Esq., and Harry J. Jordan, Esq., Suite 502, Solar Building, 1000 16th Street, N.W., Washington, D.C. 20036.

NELSON J. COONEY

APPENDIX E

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. [*Added September 18, 1940.*] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.]

* * * *

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

SEC. 5. [As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, August 2, 1949, and July 27, 1965.] [49 U.S.C. § 5.]

* * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall

set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated threewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon

equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized

representative or representatives of its or their employees.

• • • •

(4) It shall be unwaful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

• • • •

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

No. 75-1165

Supreme Court, U. S.
FILED
APR 15 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

AMERICAN TRUCKING ASSOCIATIONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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UNITED STATES OF AMERICA,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

In 1958 the Canadian Pacific Railroad acquired a 51 percent interest in Smithsons Holdings Ltd., a Canadian motor carrier holding both Canadian and American operating rights. Smithsons Holdings, through its subsidiary Smith Transport (Canada) Ltd., had, shortly before, transferred its United States authority to Smith Transport (U.S.) Ltd. An international single-line service thus became two separate services, with interchanges at the international border. In 1960 Canadian Pacific acquired the remaining 49 percent of the stock of Smithsons Holdings, including complete control of Smith Transport (Canada) (J.S. App. 22a-24a).

In 1968 Smithsons Holdings acquired the outstanding stock of Smith Transport (U.S.), an acquisition that placed Canadian Pacific in control of an American truck service. Canadian Pacific asked the Commission to approve this acquisition, pursuant to Section 5 of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U.S.C. 5.[1] After full administrative proceedings,[2] Division 3 of the Commission approved the acquisition (J.S. App. 12a-14a), adopting in substance the findings and conclusions of the administrative law judge (J.S. App. 17a-54a). The Commission concluded that the acquisition by its trucking subsidiary of the American trucking operations would enable the railroad to fulfill its continuing responsibility to handle less-than-carload traffic from Canada to the United States. The Commission found that special circumstances supported this unrestricted acquisition because no similar service is available in areas served by Smith Transport (U.S.).

Appellant brought suit, contending that the Commission could not approve the acquisition without restricting the operations of Smith Transport (U.S.) to those "auxiliary to and supplemental of" Canadian Pacific's railroad operations. The three-judge district court unanimously sustained the Commission's decision (J.S.

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[1]Canadian Pacific is subject to the Commission's jurisdiction because it operates a few miles of track in northern Vermont and Maine and controls the Soo Line in northern Michigan (J.S. App. 25a-26a).

[2]The original application was accompanied by a motion to dismiss all Section 5 proceedings on the ground that the transaction was not subject to Commission jurisdiction because actual control of Smith Transport (U.S.) had been vested in an independent trustee. The Commission rejected that contention (J.S. App. 20a). The trust now has been dissolved and all stock of Smith Transport (U.S.) is held by Smithsons Holdings (J.S. App. 4a).

App. 1a-10a). The court observed that the Commission frequently has waived such restrictions in acquisition and certification proceedings upon a showing of "special circumstances" (*id.* at 6a-7a). While recognizing that it was the first court to pass upon the propriety of such a waiver in an acquisition proceeding, the court held that this case is controlled by this Court's approval of the identical practice in other Commission cases involving railroad control of trucking operations. It also deferred to the "construction given to a statute by the administrative agency whose duty it is to carry out its provisions", which "is entitled to great weight and should not be overruled unless clearly wrong" (*id.* at 7a-8a). Finally, the district court concluded that "[t]he finding by Division 3 of 'special circumstances' warranting approval of the instant acquisition without restrictions is clearly supported by substantial evidence" (*id.* at 9a).

ARGUMENT

The district court's decision is supported by principles that have long been accepted by this Court. It extends those principles to another method by which railroads come to engage in motor transport service. This difference in form, however, does not call for a difference in result. The same rules that govern railroad entry into motor transportation should govern railroad acquisitions of existing firms. The Commission and the district court have recognized this. There is no occasion for plenary review by this Court.

1. As this Court noted in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 437: "The words 'auxiliary to or supplemental of' are not taken from the Act. There is no such specific limitation for railroad operation of motor carriers." The statute itself states simply that the Commission can approve a railroad's

acquisition of a motor carrier if the acquisition "will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition" (49 U.S.C. 5(2)(b)).

The Commission decided shortly after the enactment of the Motor Carrier Act of 1935 that it would often have to set conditions upon railroad operation of motor carriers in order to achieve the congressional "policy of opposition to railroad incursions into the field of motor carrier service." *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, 7. The Commission accordingly adopted a practice of restricting railroad-affiliated motor carriers to conducting operations that are "auxiliary to and supplemental of" the operations of the railroad. In *Rock Island, supra,* this Court approved the practice of imposing such "auxiliary and supplementary" restrictions on railroad entry into the motor transportation industry.

But the Commission also concluded nearly 30 years ago that "auxiliary and supplementary" restrictions are neither necessary nor appropriate in every case. It frequently has approved Section 5 acquisition applications that do not contain such restrictions. See *Louisville, N. A. & C. R. Co. - Purchase - Meerman,* 45 M.C.C. 6; *Rock Island Motor Transit Co. - Purchase - White Line Motor Freight,* 40 M.C.C. 457, on further hearing, 55 M.C.C. 567; *Burlington Truck Lines, Inc. - Purchase - Pirnie,* 85 M.C.C. 363; *Canadian National Transportation Ltd. - Investigation of Control,* 109 M.C.C. 392.

American Trucking Associations, Inc. v. *United States,* 355 U.S. 141, held that the Commission acted within its discretion in waiving "auxiliary and supplementary" restrictions in a certificate issued to a railroad's

motor carrier subsidiary. Three years later, in *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, this Court decided that the Commission could not waive the customary restrictions in a certificate in the absence of special circumstances. Although both cases involved the issuance of certificates rather than the approval of acquisitions, there is no reason to apply a different rule to acquisitions. The Commission's practice of requiring "auxiliary and supplementary" restrictions in the absence of a showing of "special circumstances" rests on the general policy of the Motor Carrier Act rather than upon the specific language of Section 5(2)(b). The decision below is consistent with the language of the statute and the longstanding practice of the Commission. It does not conflict with the decision of any other court.[3]

The jurisdictional statement does not advance any reason, grounded in policy or in the statute, that would justify rules for acquisitions different from the rules applying to the issuance of new certificates. Appellant merely asserts that this Court should grant review because it has not considered this precise narrow question in the past. This is not a sufficient reason for plenary review.

2. Appellant also asserts (J.S. 16-21) that the Commission erred in concluding that the acquisition will enable Canadian Pacific "to use service by motor vehicle to public advantage in its operations" (Section 5(2)(b)).

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[3]Although the Court's opinion in the first *American Trucking Associations* case contains dicta indicating that the Section 5(2)(b) proviso may impose some mandatory restrictions, the Court's subsequent decision in *American Trucking Associations, Inc.* v. *Frisco Co.,* 358 U.S. 133, 140, n. 5, observed that the question remains open.

Because of this, appellant argues, the acquisition should not have been approved even if the restrictions it insists upon are not required. This argument is essentially dependent upon the particular facts of this case and does not call for plenary review.

The Commission concluded that the statutory requirement is satisfied because Canadian Pacific can utilize Smith Transport (U.S.) to enable it to carry less-than-carload shipments to points in the United States. Appellant apparently believes that this rationale is deficient because the subsidiary's motor service does not run parallel to the parent's rail operations. But nothing in the language or the legislative history of Section 5(2)(b) supports such a reading of the term "public advantage." The Commission properly found that facilitation of less-than-carload service is to the "public advantage."

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1165

AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court
for the District of Columbia

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1165

AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16(1)(c) of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered on October 20, 1975, by a District Court of three judges specially constituted pursuant to 28

U.S.C. §§ 2284 and 2325, dismissing appellant's complaint which sought to set aside a decision and order of Division 3 of the Interstate Commerce Commission. By that order the ICC approved an application granting Smithsons Holdings Limited, a subsidiary of Canadian Pacific Limited, a railroad subject to Part I of the Interstate Commerce Act, authority to acquire the capital stock of Smith Transport (U.S.) Limited, a motor carrier subject to Part II of the Act. The Commission adopted the Initial Decision of its Administrative Law Judge (ALJ) who found that the transaction satisfied the provisions of Section 5 of the Act, 49 U.S.C. § 5, including the proviso of Section 5(2)(b), 49 U.S.C. § 5(2)(b), that the Commission shall not approve the acquisition of control of a motor carrier by a railroad "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

In its district court suit, appellant argued that the ICC's grant of authority is in error for the reason that, as a matter of law, the Commission may approve the acquisition and control of a motor carrier by a railroad or its affiliate only to perform operations which are functionally tied to the railroad's operations. Stated otherwise, appellant argued that the Commission should have restricted the service of Smith Transport (U.S.) to operations "auxiliary to and supplemental of" the railroad operations of Canadian Pacific. Appellant also argued that the Commission erroneously found that the operations sought to be acquired will assist Canadian Pacific in the performance of its railroad operations.

The District Court held that Section 5(2)(b) does not preclude the Commission in "special circumstances" from approving the acquisition of a motor carrier by a railroad without auxiliary and supplemental restrictions, that the Commission's finding of "special circumstances" in this proceeding is clearly supported by substantial evidence, and that the evidence of record also supports the Commission's finding that approval of the transaction is consistent with the public interest, will not unduly restrain competition, and will enable the Canadian Pacific to use such service to public advantage in its operations. (J.S. 8a-10a)

ARGUMENT

The decision of the District Court is correct and should be affirmed. Appellant raises substantially the same allegations of error previously considered and rejected by both the ICC and the District Court, and its appeal raises no substantial questions warranting plenary review by this Court.

1. The Commission is not required in all instances by Section 5(2)(b) to restrict motor carrier authority acquired by a railroad or its affiliate to operations auxiliary to and supplemental of rail operations. Appellant erroneously reads Section 5(2)(b) as absolutely requiring that motor carrier authority acquired by a railroad, or in this instance an affiliate of a railroad, be so functionally limited. Appellant's reading of Section 5(2)(b) is contrary to its legislative history, ICC interpretation and implementation of that section, and approving court decisions.

Congress passed the "Motor Carrier Act, 1935" to end destructive competitive practices among motor car-

riers themselves and in competition with railroads. At the same time, Congress recognized the vast potential of motor carriage and the necessity for its continued development. Congress was also mindful that the railroads by their entrenched position and economic muscle could stifle competition and prevent the development of viable for-hire motor carriage. Accordingly, Congress took steps to protect the infant industry from destruction by other modes by enacting Section 213(a)(1) of the Act. However, though Congress deemed it desirable to protect the fledgling motor carrier industry from railroad domination, its purpose was not absolutely to prohibit railroad entry into the motor carrier field.[1] The language of Section 213(a)(1) and later Section 5(2)(b)[2] was general: it did not *define* how or in what manner motor carrier operations could be used to public advantage by a rail carrier in its operations, and there was no expressed prohibition against railroads or their affiliates engaging in motor carrier operations under new franchises or against acquiring control of motor carriers holding certificates or permits from the ICC. Wisely Congress left interpretation of this language to the ICC, recognizing that the Commission as the experienced regulator was in the best position to adapt Congress's general policy

[1] See: Hearings on H.R. 5262 And H.R. 6016 Before A Subcommittee Of The House Committee On Interstate And Foreign Commerce, 74th Cong., 1st Sess. (1935); House Committee Report No. 1645, 74th Cong., 1st Sess (1935); Report No. 482 to Accompany S. 1629, 74th Cong., 1st Sess. (1935); 79 Cong. Rec. 5877 (1935); 79 Cong. Rec. 12206 (1935).

[2] Section 213(a)(1) of the "Motor Carrier Act, 1935" was slightly modified in a manner not here pertinent by the "Transportation Act of 1940" and redesignated Section 5(2)(b).

regarding railroad use of motor carriage to changing conditions in transportation.

Congressional policy regarding railroad entry into the motor carrier field comes into play in proceedings under Section 5(2)(b) where control of an independent motor carrier is involved or under the licensing provisions of Sections 207 and 209 where new authority is sought by a railroad or its affiliate. Initially the Commission's policy was to approve those Section 5 acquisitions where the motor carrier service was closely tied to the rail operations; that is, where the motor carriers were "auxiliary to and supplemental of" rail operations. See, *Pennsylvania Truck Lines, Inc.—Control—Barker,* 1 M.C.C. 101 (1936), 5 M.C.C. 9 (1937); *Kansas City S. Transport Co., Inc., Com. Car. Application,* 10 M.C.C. 221 (1938), 28 M.C.C. 5 (1941). The Commission followed this policy until 1945 when it began to change. In *Rock Island Motor Transit Co.—Purchase—White Line M. Frt.,* 40 M.C.C. 457 (1946), 55 M.C.C. 567 (1949), a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad sought authority under Section 5(2)(b) to acquire certain unrestricted motor carrier authority. In approving the acquisition, the Commission imposed restrictions, including one requiring that the service be "auxiliary or supplemental" to rail service. The Supreme Court acquiesced to this action in *United States* v. *Rock Island Motor Transit Co.,* 340 U.S. 419 (1951). Thereafter, the rail subsidiary filed a Section 207 application for a certificate authorizing unrestricted operations. In a report by the entire Commission, unrestricted motor carrier rights were granted in *Rock Island Motor Transit Co., Com. Car. Application,* 63 M.C.C. 91 (1954),

the Commission stating that it "may issue certificates to motor-carrier affiliates of railroads with or without restrictions as the circumstances may require." (63 M.C.C. at 101) This Court approved the "special circumstances" exception in the Section 207 context in *American Trucking Assos.* v. *United States,* 355 U.S. 141 (1957). Three years later, in *American Trucking Assos.* v. *United States,* 364 U.S. 1, 10-11 (1960), this Court again held that the requirements of Section 5(2)(b) do not prevent the Commission from granting unrestricted motor carrier authority to a railroad when in the public interest:

> "[W]hile the judicial and administrative current has run strongly in favor of auxiliary and supplemental restrictions on motor carrier subsidiaries of railroads, the Commission has determined, and this Court has agreed, that the public interest may sometimes be promoted by not imposing such limitations."

The Commission has frequently issued certificates to railroad subsidiaries in Section 207 applications without restrictions where "special circumstances" were found to exist; that is, where unrestricted operations by the rail-owned carrier were found on specific facts and circumstances to be in the public interest. Appellant concedes that the Commission may in "special circumstances" issue unrestricted motor carrier rights to a railroad affiliate under Section 207, but contends that the ICC is powerless to approve an acquisition under Section 5(2)(b) functionally unrestricted to the rail operation of the parent. (J.S. 7, 10-11)

Application of a "special circumstances" exception in a Section 5(2)(b) acquisition proceeding has not previously been subject to judicial review. However,

the Commission has consistently stated that it need not impose "auxiliary and supplemental" restrictions on motor carrier operations in a Section 5 transaction where an unrestricted grant of authority is warranted by the facts and the standard of Section 5(2)(b) is otherwise satisfied. See, *Canadian Nat'l. Trans.—Investigation of Control,* 109 M.C.C. 392 (1970); *Burlington Truck Lines, Inc.—Purchase—Pirnie,* 85 M.C.C. 363 (1960).[3]

Appellant attempts to dismiss past ICC grants of unrestricted motor carrier authority in Section 5 proceedings as unlawful departures from Congressional policy and therefore no precedent for the action under review. However, as the District Court pointed out (J.S. 7a-8a), it is well settled that the construction given to a statute by the administrative agency charged with the duty to carry out its enforcement is entitled to great weight and is not to be overruled unless clearly wrong. *Perkins* v. *Matthews,* 400 U.S. 379 (1971); *Investment Co. Institute* v. *Camp,* 401 U.S. 617 (1971); *Billings* v. *Truesdell,* 321 U.S. 542 (1944); *Gray* v. *Powell,* 314 U.S. 402 (1941). This limitation on the

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[3] These Section 5 cases were also mentioned by the Commission in the *Burlington* decision as other instances where no auxiliary and supplemental limitations were imposed: *ET & WNC Transp. Co.—Purchase—Huckabee,* 56 M.C.C. 50 (1949); *ET & WNC Transp. Co.—Control—Inter City Trucking Co.,* 65 M.C.C. 390 (1955); *Louisville, N.A. & C.R. Co.—Purchase—Meerman,* 45 M.C.C. 6 (1946); *Pacific Motor Trucking Co.—Pur.—Lowinel Trucking Co.,* 60 M.C.C. 373 (1954); *Burlington Truck Lines, Inc.—Purchase—Coffey,* 70 M.C.C. 385 (1957); *Santa Fe Trail Transp. Co.—Purchase—Brooks and Pitts,* 70 M.C.C. 725 (1957); *Burlington Truck Lines, Inc.—Purchase—Love,* 75 M.C.C. 258 (1958); *Santa Fe Trail Transp. Co.—Purchase—Lang and Givens,* 70 M.C.C. 773 (1957), 75 M.C.C. 385 (1958); *Burlington Truck Lines, Inc.—Purchase—Hobby,* 75 M.C.C. 322 (1958).

court's power of review has also been applied to many decisions involving the ICC's interpretation of the Interstate Commerce Act. See, *United States* v. *American Trucking Assos.*, 310 U.S. 534 (1940); *Chicago St. P.M.&O. Ry. Co.* v. *United States*, 50 F. Supp. 249 (D. Minn. 1943), aff'd, 322 U.S. 1 (1944); *I.C.C.* v. *Allen & Kroblin, Inc.*, 212 F. 2d 555 (8th Cir., 1954), cert. denied, 348 U.S. 831 (1954). (J.S. 8a) Moreover, a consistent and long standing interpretation of a statute is entitled to special consideration, and here the Commission has held for over 30 years that Section 5(2)(b) permits the grant of unrestricted rights when "special circumstances" warrant it. *Cf. Dismuke* v. *United States*, 297 U.S. 167 (1936); *Alaska S.S. Co.* v. *United States*, 290 U.S. 256 (1933).

Appellant claims that this Court in the two *Rock Island* cases first recognized and endorsed the "auxiliary and supplemental" standard both for acquisitions under Section 5 and for applications for new authority under Section 207 and then qualified the standard as "mandatory" in Section 5 proceedings and permissive in Section 207 proceedings. (J.S. 11) The first *Rock Island* case (340 U.S. 419 (1951)), as indicated previously, affirmed the propriety of the Commission's action in imposing "auxiliary and supplemental" restrictions. There is no language in that decision that supports appellant's proposition that such restrictions are mandatory in a Section 5 case. The second *Rock Island* case (355 U.S. 141 (1957)), affirmed the grant of unrestricted rights to the same carrier in a Section 207 proceeding, and again this Court did not state that "auxiliary and supplemental" restrictions are mandatory in Section 5 cases. That this Court has not so held is manifest in view of its statement in *American Trucking Associations* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958), a year after the second *Rock Island* case. In the *Frisco* case, authority was issued in a Section 5 proceeding without "auxiliary and supplemental" restrictions. The omission was an inadvertent clerical error. Before this Court, appellant argued that the Commission was without power to issue unrestricted certificates under Section 5(2)(b). In a footnote to its decision, this Court responded to that contention (358 U.S. 141, fn. 5):

> "We have not had occasion to rule definitely whether that Section states rigid requirements that operations of rail-affiliated motor carriers be auxiliary or supplementary to train service. Cf. *American Trucking Assns.* v. *United States*, 355 U.S. 141, 2 L ed 2d 158, 78 S Ct 165. As resolution of the question is unnecessary for the present decision, we intimate no position with regard to it."

Considering the foregoing, it is submitted that the District Court correctly found that the ICC has the power under Section 5(2)(b) to grant unrestricted operating rights to a railroad or its affiliate where "special circumstances" exist and where the transaction is otherwise consistent with the public interest provisions of that section. Despite appellant's claim otherwise, no impediment exists either in the language of the statute or relevant case law to preclude such a grant of authority. Considering the Commission's long and unchallenged interpretation of its power under Section 5(2)(b) to issue unrestricted rights in unusual circumstances, strong precedent exists for not disturbing the lower court's decision.

2. Contrary to appellant's claim, the District Court properly found that the acquisition is consistent with the proviso of Section 5(2)(b) and that the ICC's

finding in this regard is supported by substantial evidence.

The transaction clearly satisfies the three-pronged test of Section 5(2)(b). As to the first standard, the transaction is manifestly in the public interest since common control and operation of Smith (U.S.) and Smith (Canada)[4] will permit the two carriers to operate as a single integrated system on international traffic between the United States and Canada resulting in operating economies and efficiencies and safer service to the ultimate benefit of the shipping and receiving public.[5] The ALJ had no difficulty in finding that the record demonstrated that the "public interest requires the proposed transaction" (J.S. 49a-50a); the Commission had no doubts about affirming his finding (J.S. 12a-13a); and the lower court found their findings and conclusions fully supported by the evidence. (J.S. 8a-10a)

As it did before the District Court, appellant argues principally that the Commission cannot find that the motor carrier service will be used "to public advantage in its operation," as required by the second test of Section 5(2)(b), because the Canadian Pacific has no tracks in the territory served by Smith (U.S.). (J.S. 17-18) Appellant claims that the *Burlington* and *Canadian Natl.* cases, *supra,* relied upon by the Commission and the court as precedent, are themselves sig-

[4] As indicated in the ALJ's Initial Decision (J.S. 22a-24a), Smith (Canada) is the Canadian counterpart of Smith (U.S.) and is also controlled by Smithsons Holdings and in turn the Canadian Pacific. The two operations were at one time a single motor carrier service and have been operated separately or jointly at one time or another for almost 30 years.

[5] For a detailed discussion of the specific benefits accruing to the public, see pages 29a-31a of the Jurisdictional Statement.

nificant departures from the required statutory finding and factually distinguishable from this proceeding. In the *Burlington* case, appellant states the Commission was able to conclude that "[t]he record contains abundant unrefuted evidence establishing that this transaction will enable the railroad to use service by motor vehicle to public advantage in its operations within the meaning of the statute, to the extent the regular-route operating rights authorize service at points which are stations on the railroad." (85 M.C.C. at 367) No such finding, states appellant, can be made in this proceeding. (J.S. 19)

As indicated in the ALJ's Initial Decision, elimination of rail less carload (LCL)[6] service by United States railroads generally, and the New York Central in particular, prevented Canadian Pacific from effectively handling LCL traffic between Canada and the New York-New Jersey area served by Smith (U.S.).[7]

[6] LCL refers to shipments of small quantities—up to 10,000 pounds—by railroads.

[7] Withdrawal of the New York Central from handling LCL traffic had a dramatic impact upon the international operations of Canadian Pacific between Canada and the United States. Revenue freight of Canadian Pacific and Canadian National, the only two Canadian railroads, destined to Ontario from United States points dropped from 141,706 tons in 1950 to 5,945 tons in 1969; and in the reverse direction from 334,905 tons to 11,166. Revenue freight between Quebec and United States points dropped from 126,999 tons in 1950 to 3,334 tons in 1969. (Exh. 23, App. A) Tons of LCL freight originated and delivered to other railroads by New York Central declined from 596,459 tons in 1950 to 1,369 tons by 1967, or almost 100 percent. LCL tons received from connecting lines and terminated on the lines of New York Central decreased from 389,722 tons in 1950 to 1,673 tons in 1967, again almost 100 percent. Total LCL tons transported by the railroad declined from 1,593,445 in 1950 to 4,404 by 1967. (Exh. 20, Table B) (J.S. 37a-38a, 50a)

Acquisition of control of Smith (U.S.) will permit the Canadian Pacific to continue its participation in LCL type traffic between Canadian points and the territory served by Smith (U.S.), with the Smith (U.S.) service replacing the former operation of the New York Central. Approval of this transaction will, therefore, permit the Canadian Pacific to use the service of Smith (U.S.) to public advantage in its rail operation. As the ALJ found (J.S. 50a):

> "Although Canadian Pacific must by law continue to provide LCL service in its Canadian operation and we have no jurisdiction over this portion of its operation, it cannot be overlooked that the motor carrier service in the United States is part of substituted motor-for-rail operations in the movement of small shipments between the two countries and therefore to public advantage in rail service, to say nothing of the increased advantage to the shipping public in efficiencies of movement of shipments, tracing of shipments, speed of delivery, etc. It is therefore clearly in the public interest to approve the application without restrictions."

Apart from clarifying the ALJ's misuse of the term "substituted motor-for-rail service,"[8] Division 3 adopted his conclusion (J.S. 12a-13a), and the entire Commission affirmed the findings and conclusions of Division 3. And the lower court, after reviewing the

[8] "Substituted motor-for-rail" operations refer to a motor carrier service actually substituted for existing rail service and such proceedings arise under Section 207, not Section 5. Such operations are approved principally on the basis of anticipated operating economies and efficiencies. *See, Santa Fe Trail Transp. Co. Ext.—Pampa, Tex.*, 79 M.C.C. 300 (1959); *Black Diamond Transport Co. Com. Car. Application*, 83 M.C.C. 163 (1960).

record and hearing oral argument on the issue, concluded (J.S. 10a):

> "An analysis of the detailed decision of the ALJ establishes that the 'public advantage in its operations' test was carefully considered and applied to the evidence of record. Likewise, the Commission considered both the change in the railroad's position caused by the decline of LCL train service in the United States and the testimony of the applicant's traffic consultant prior to adopting the ALJ's recommendation. The evidence submitted to the Commission clearly supports the Commission's finding that Canadian Pacific will be able to use the services of Smith Transport (U.S.) to public advantage in its operations."

There is no requirement in Section 5(2)(b), its legislative history, or the controlling case law to support appellant's proposition that a grant of motor carrier authority to a railroad, or a railroad affiliate, must be restricted to service at points which are rail stations. (J.S. 18-19) On numerous occasions, the Commission has granted motor carrier authority to railroad affiliates to serve points or territories beyond the railroad parent's line, including authority to serve rail stations of other railroads. See e.g., *Propane Transport, Inc. —Purchase—Propane Transport,* 109 M.C.C. 384 (1970); *Great Northern Ry. Co.—Control—Superior & D. Transfer,* 85 M.C.C. 401 (1960); *Burlington Truck Lines, Inc.—Purchase—Hobby, supra; Santa Fe Trail Transp. Co.—Purchase—Brooks & Pitts, supra.* Significantly, in the *Burlington* case cited by appellant (85 M.C.C. 363; J.S. 19), the Commission also granted authority to serve points which were not rail stations and others which were rail stations of another railroad. That the facts of the *Burlington*

and *Canadian Natl.* cases may not be on all fours with those in this case is not significant. They are precedent for the principle that under proper circumstances unrestricted rights may be granted in conformity with the proviso requirements of Section 5(2)(b).

The third requirement of Section 5(2)(b) is not seriously contested by appellant since approval of the transaction will plainly "not unduly restrain competition." Operation of Smith (U.S.) and Smith (Canada) as a fully integrated motor carrier service is nothing more than the continuation of a service that has been in existence, as a single operation or separately managed but closely coordinated motor carrier operation, for almost thirty years. Competing carriers in the United States and Canada have long since adjusted to such service. Cf. *Jefferson Lines—Purchase—Jefferson Trans.*, 104 M.C.C. 497 (1968). Moreover, the most significant indication that approval of this transaction will not, and has not, unduly restrained competition is the absence of active, substantial motor carrier participation in the last hearing before the Commission, and the failure of any independent motor carriers to join in the suit before the District Court. Appellant, a trade association made up of affiliated State trucking associations, cannot claim to be injured in any way by the ICC's approval of this transaction since it operates no motor vehicles and transports no freight. In other words, we have a trade association unable to show any potential personal injury opposing an ICC decision in a proceeding where the motor carriers had at best limited interest and have long abandoned any active role in the case. Appellant's claimed undue restraint on competition is obviously baseless.

3. The Commission found that "special circumstances" justifying a grant of functionally unrestricted authority exist in this proceeding because of the continuing responsibility of Canadian Pacific to transport LCL traffic and the absence of rail outlets for such traffic in the area served by Smith (U.S.), coupled with the fact that approval of the transaction would be to the public advantage and in no way would unduly restrain competition. Despite appellant's contrary position, what constitutes "special circumstances," as the District Court pointed out, is dependent upon the facts of each individual case,[9] and the unusual facts of this proceeding warrant the result reached. The District Court also properly found that the Commission's decision and order was within the ICC's statutory power and based upon appropriate findings supported by substantial evidence within the rule of *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57 (1966). (J.S. 9a) Appellant has failed to raise any reasons to disturb this finding.

4. As the District Court pointed out (J.S. 5a), the crux of this controversy is the Commission's implementation of the proviso of Section 5(2)(b) to meet changing conditions in the transportation industry. Appellant reads the underlying Congressional policy as if frozen in time and treats the transportation industry as it existed in the 1930's and early 1940's. In

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[9] *Cf. Rio Grande Motor Way, Inc.—Control and Merger*, 87 M.C.C. 479 (1961); *Rock Island Motor Transit Co., Extension—Oakbrook, Ill.*, 91 M.C.C. 161 (1962); aff'd sub nom. *American Trucking Association* v. *United States*, 260 F. Supp. 386 (D.C. D.C. 1966), aff'd per curiam, 387 U.S. 93 (1967); *Santa Fe Trail Trans. Co., Ext.—Colo. & Kans. Points*, 111 M.C.C. 224 (1970); *Pacific Transportation, Extension—Elimination of Restrictions*, 117 M.C.C. 224 (1972), aff'd sub nom. *American Trucking Association, Inc.* v. *United States*, 373 F. Supp. 252 (W.D. Tex. 1973).

contrast, the Commission reads the proviso as permitting it to adapt regulatory policy to changing transportation requirements. Thus, while it may have been appropriate to curtail railroad entry into the motor carrier field in the early days of regulation, such a policy is no longer necessary since motor carriers, not railroads, are the dominant mode. Previously, appellees traced the ICC and court decisions giving rise to the modification of this regulatory policy, and it was shown that this Court has approved the principle that the Commission does not act beyond its statutory authority when, occasionally in the public interest, it grants motor carrier rights in Section 207 proceedings to a railroad without auxiliary or supplemental restrictions. (See, *American Trucking Assos.* v. *United States,* 355 U.S at 151-152) It naturally follows that if the Commission has the power to issue unrestricted rights under Section 207, it also has the same power under Section 5(2)(b) since Congressional policy regarding railroad entry into the motor carrier field is obviously the same whether viewed from the standpoint of a new application for authority or the purchase of existing rights. In substance, then, appellees submit that appellant is arguing not an issue of law, but its interpretation of what facts it deems appropriate to establish "special circumstances" justifying a grant of unrestricted motor carrier authority. But the ICC, not the appellant, is the regulatory expert charged with the responsibility of enforcing the Act and evaluating the evidence, and the District Court has held that its finding of "special circumstances" in this proceeding is adequately supported by the evidence of record. It is pointed out further that the Commission's decision here does not abrogate Congressional policy regarding rail entry into the motor carrier field; the proviso of Section 5(2)(b) must still

be accommodated in all future rail acquisitions of motor carrier rights. In this instance, there were exceptional circumstances justifying approval of the transaction.

It is submitted, therefore, that the Commission's decision will have no significant impact upon the transportation industry so as to require this Court's plenary review.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: March 16, 1976

Certificate of Service

I, Harry J. Jordan, one of the attorneys for appellees herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 16th day of March, 1976, copies of the foregoing document, in duly-addressed envelopes, with postage prepaid, were served upon the following parties:

1. The Honorable Robert H. Bork, Solicitor General, Thomas E. Kauper, Asst. Attorney General, and John Osborn, Attorney, Department of Justice, Washington, D. C. 20530.

2. Arthur J. Cerra, General Counsel, and Kenneth G. Caplan, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

3. Peter T. Beardsley, Robert L. James, Todd A. Peterman, and Nelson J. Cooney, Attorneys, 1616 P Street, N.W., Washington, D. C., Counsel for Appellant.

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